No. —— 00 1174 JAN 10 2001

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IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, *et al.*,
Petitioners,

v.

DANIEL WEBSTER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may enjoin a local government from ever considering race, ethnicity, or gender in future government contracting, where such a broad injunction exceeds the scope of the constitutional violation it purports to remedy, extends beyond the court's equity jurisdiction, and severely limits the discretion of a sovereign body to address and ameliorate past discrimination.

2. Whether an injunction prohibiting a local government from enforcing a government contracting program creating a preference for minority- and women-owned businesses is moot and must be vacated, where the program automatically expired pending appeal, and no new race- or gender-conscious program has replaced it.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,
Appellant/Cross-Appellee Below.

Michael Cooper,
Appellant/Cross-Appellee Below.

Daniel Webster,
Appellee/Cross-Appellant Below.

Peggy Webster,
Appellee/Cross-Appellant Below.

Webster Greenthumb Co.,
Appellee/Cross-Appellant Below.

Kelly Goff,
Appellee/Cross-Appellant Below.

Pursuant to Rule 29.6, petitioners state that the named petitioners do not have any corporate parent, subsidiary, or affiliate that is publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Fulton County, Georgia ("Fulton County" or "the County"), through undersigned counsel, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the United States District Court for the Northern District of Georgia permanently enjoining the County from using racial, ethnic, or gender participation goals in evaluating or awarding County contracts.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 218 F.3d 1267, and is reprinted at Pet. App. 1a. The opinion of the district court entering final judgment with respect to the constitutionality of the challenged program is reported at 51 F. Supp. 2d 1354, and is reprinted at Pet. App. 2a-64a. The opinion of the district court on cross-motions for summary judgment is reported at 44 F. Supp. 2d 1359, and is reprinted at Pet. App. 65a-112a. The opinion of the district court with respect to attorneys' fees and costs is reported at 112 F. Supp. 2d 1339, and is reprinted at Pet. App. 113a-203a. The Court of Appeals' order denying Fulton County's petition for rehearing and suggestion for rehearing *en banc*, which will be published in a table at ___ F.3d ___, is reprinted at Pet. App. 204a-205a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 2000. *See* Pet. App. 1a. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 12, 2000. *See* Pet. App. 204a-205a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions, the pertinent portions of which are set forth below:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

> The Judicial Power shall extend to all Cases . . . [or] Controversies . . . .

U.S. Const. art. III, § 2.

STATEMENT OF THE CASE

This petition seeks review of an Eleventh Circuit decision upholding an injunction that forbids Fulton County, Georgia, from ever considering race, ethnicity, or gender in connection with future County contracting. The injunction thus bars the County not only from enforcing the affirmative action program that the district court actually considered and struck down as unconstitutional — a program that automatically expired during the appeal in this case — but also from adopting any new affirmative action program based on an updated factual predicate.

The Eleventh Circuit's decision upholding this sweeping injunction directly conflicts with a recent decision of the Sixth Circuit, which held that once an existing affirmative action program has been declared unconstitutional and its enforcement enjoined, a broader injunction against future affirmative action programs improperly exceeds the scope of the constitutional

violation it purports to remedy and extends beyond the court's equity jurisdiction. The decision below also conflicts with Second Circuit decisions recognizing that the constitutionality of an affirmative action plan depends on the factual justification offered for that plan, leaving local governments free to enact new plans supported by new data even when the factual justification for a previous plan was inadequate. Review is warranted to resolve these conflicts and to address the injunction's unlawful and unwarranted intrusion upon the County's authority to adopt appropriately narrow remedial legislation if a record is assembled that avoids the evidentiary deficiencies identified by the district court. Moreover, the Eleventh Circuit's failure even to consider this issue in its decision was plainly erroneous, and provides an additional reason for granting review.

Review is also warranted because even a properly tailored injunction — limited to enjoining enforcement of the plan at issue in this case — could not stand. This Court and other circuits have held that when legislation expires or is repealed or amended, any issues arising from its application are moot and cannot be addressed by a federal court consistent with Article III. Because the challenged affirmative action program expired automatically pending appeal, and no new race- or gender-conscious program has replaced it, any injunction against enforcement of that program would be moot and would have to be vacated.

A. Background

This case arises from Fulton County's efforts to remedy a long history of discrimination against minority- and female-owned businesses in the County. In pursuit of that goal, the Fulton County Board of Commissioners (the "Board") adopted

its first minority business enterprise program in 1979. Pet. App. 3a. That program was continued by Board resolutions in 1984 and 1987. *See id.* Additionally, from 1989 to 1993, Fulton County instituted a program of race- and gender-neutral measures designed to increase the pool of bidders in the County's contracting. During this same period, the County also commissioned studies to determine whether discrimination was present in the relevant markets. Those studies showed gross underrepresentation of minority contractors, as well as discrimination against female business owners. The County also assembled an extensive record of anecdotal discrimination, which revealed pervasive discrimination against minority and female business enterprises. The Board conducted public hearings during 1992 to consider these studies, together with additional verbal and written testimony from numerous witnesses. *See* Pet. App. 4a-5a.

On the basis of the record compiled at those hearings, as well as the studies previously commissioned, Fulton County adopted an affirmative action contracting program in 1992, and amended that program to adopt the 1994 Minority and Female Business Enterprise ("MFBE") Program so as "to alleviate the effects of past and present discrimination against minority and female business enterprises and to enhance contracting opportunities for minority and female businesses." Pet. App. 6a. Instead of fixed quotas, the 1994 MFBE Program established annual participation goals with respect to African-American businesses, Hispanic businesses, Asian-American businesses, Native American businesses, and female businesses. *See* Pet. App. 7a. The Program also continued the previously adopted race- and gender-neutral business opportunity measures. *See* Pet. App. 11a-12a.

By its terms, the Program was to expire automatically after five years, unless the Board renewed it. *See* Pet. App. 6a. In fact, the Program did expire on September 16, 1999 — while this case was on appeal to the Eleventh Circuit. *See infra*. No race- or gender-conscious program has replaced it.

B. Proceedings Below

Plaintiffs Daniel Webster, Peggy Webster, and the Webster Green Thumb Company ("Green Thumb") filed suit in 1996 in the United States District Court for the Northern District of Georgia, challenging the constitutionality of Fulton County's 1994 MFBE Program under 42 U.S.C. §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment. On cross-motions for summary judgment, the district court issued an order on February 12, 1999, denying Green Thumb's motion and granting in part the County's motion. *See* Pet. App. 65a. After a six-day bench trial that began on May 11, 1999, and addressed only the constitutionality of the 1994 MFBE Program, the court issued a final judgment that Green Thumb had standing to challenge the Program (the plaintiffs conceded that the Websters lacked individual standing), and that the Program violated the Equal Protection Clause. *See* Pet. App. 15a, 63a.

Specifically, the court concluded that the County had not established an adequate "evidentiary foundation" for the Program, and that the Program was not narrowly tailored to meet a compelling governmental interest. Pet. App. 63a. The court based its finding primarily on its conclusion that the County had not itself discriminated in awarding contracts and could not disprove race-neutral explanations for gross disparities in the rates at which minority businesses obtained County contracts. In so holding, the court gave no weight to

the County's unrebutted evidence of pervasive discrimination in the *private* market — discrimination that the County was obligated to remedy. The district court also entered an injunction permanently enjoining the County "from using racial, ethnic or gender participation goals in accepting or rejecting bids, determining whether bidders are responsive and responsible bidders and in the awarding of Fulton County contracts." Pet. App. 63a.

The broad scope of that injunction was at odds with the representations of counsel and the evidence presented at trial. Counsel for both Green Thumb and the County emphasized that the plaintiffs sought an injunction against the 1994 MFBE Program only. Counsel for Green Thumb asked only for an injunction against "continuing *the 1994 MFBE Program*." May 24, 1999 Trial Tr. 1014 (emphasis added); *see also id.* 1079-80 ("The evidence is clear that *this program* cannot withstand constitutional muster, and *we ask your Honor* to enjoin *it* immediately.") (emphasis added). In his opening statement, counsel for the County likewise explained: "*[T]he plaintiffs are seeking only injunctive relief prospectively for this program which, as the evidence will show, is scheduled to sunset in September of 1999, a few months from now.*" May 11, 1999 Trial Tr. 29-30 (emphasis added). Similarly, in closing, counsel contended that "[p]laintiffs have not met their burden to obtain *an injunction enjoining the remaining three months of this five-year program.*" May 24, 1999 Trial Tr. 1042 (emphasis added).

At no time before the entry of final judgment did the district court suggest that it might enter a broader injunction. To the contrary, the court made clear that it planned to evaluate only the 1994 MFBE Program and its constitutionality. *See* Pet. App. 2a (describing the trial as involving only "the issue of

whether Defendant Fulton County's 1994 Minority and Female Business Enterprise ("MFBE") Program is in violation of the Equal Protection Clause"). Moreover, at the outset of the trial, the court noted that "the implementation of the *Fulton County MFBE Program* is not before the Court," although "there may be aspects of the implementation *of the program* which are so intertwined with the constitutionality *of the program* itself that I don't want to . . . issue any legal rulings that are going to affect the introduction of evidence." May 11, 1999 Trial Tr. 3-4 (emphasis added). The district court nevertheless entered an injunction that not only barred enforcement of the 1994 MFBE Program, but also prohibited Fulton County from ever considering race, ethnicity, or gender in awarding contracts.

Because the 1994 MFBE Program was still in effect at the time of the district court's ruling, the County did not argue that a properly tailored injunction would be moot, and the district court did not address mootness in its opinion. The Program automatically expired on September 16, 1999, and has not been replaced.

The County appealed the district court's final judgment to the United States Court of Appeals for the Eleventh Circuit, arguing that: (1) the injunction should be vacated because it exceeded the scope of the constitutional violation it purported to remedy, and an appropriately narrowed injunction would be moot; (2) the district court erred in finding that the County violated the Equal Protection Clause; and (3) Green Thumb's challenge to the 1994 MFBE Program should be rejected for lack of standing.[1] On July 19, 2000, an Eleventh Circuit panel

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[1]Green Thumb cross-appealed, challenging (1) an interlocutory order denying plaintiffs' motion to contact prospective class members, and (2) the dismissal of plaintiff Kelly Goff on standing grounds. The cross-appeal was

issued a decision affirming on the basis of the district court's opinion. *See* Pet. App. 1a. Thus, the panel upheld the district court's injunction permanently prohibiting Fulton County from using racial, ethnic, or gender participation goals in evaluating or awarding County contracts. In a footnote, the panel declined to address the County's challenge to the scope of the injunction on the ground that "[t]he argument was not presented to the district court; rather, it was raised for the first time on appeal." Pet. App. 1a. Fulton County's petition for rehearing and suggestion for rehearing *en banc* was denied on October 12, 2000. *See* Pet. App. 205a.

REASONS FOR GRANTING THE WRIT

This case presents two important questions. First, may a federal court issue an injunction that forbids a local government from ever considering race, ethnicity, or gender in future government contracting, where such a broad injunction exceeds the scope of the constitutional violation it purports to remedy, extends beyond the court's equity jurisdiction, and severely limits the discretion of a sovereign body to address and ameliorate past discrimination. Second, whether an injunction prohibiting a local government from enforcing a government contracting program creating a preference for minority- and women-owned businesses is moot and must be vacated, where the program automatically expired pending appeal, and no new race- or gender-conscious program has replaced it.

Each of these questions warrants review. *See* S. Ct. Rule 10. The Eleventh Circuit's decision upholding the injunction issued by the district court directly conflicts with decisions of other circuit courts. The Sixth Circuit vacated portions of an

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dismissed in its entirety.

injunction virtually identical to the one at issue here, on the ground that once an existing affirmative action program has been declared unconstitutional and its enforcement enjoined, a broader injunction against future affirmative action programs improperly exceeds the scope of the violation it purports to remedy. *See Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 418 (6th Cir. 1999). The Second Circuit has similarly recognized that the constitutionality of an affirmative action plan depends on the statistical data supporting that plan, so that local governments are free to enact new plans supported by new data even if the factual justification for a previous plan was insufficient. *See Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 66 (2d Cir. 1994); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). This Court's review is necessary to reconcile these decisions with the Eleventh Circuit's order upholding a grossly overbroad injunction against Fulton County.

More fundamentally, this Court should review the important issue presented here because as a result of the decisions below, Fulton County — perhaps alone among sovereign jurisdictions in the United States — is under an injunction that permanently forbids it, upon pain of contempt, from considering race, ethnicity, or gender in future County contracting. Such an injunction improperly intrudes upon the County's authority to adopt appropriately narrow remedial legislation if a record is assembled that addresses the evidentiary deficiencies identified by the district court. *See, e.g., City of Columbus*, 172 F.3d at 415. Indeed, the injunction effectively gives the district court an unprecedented form of

preclearance authority over any such legislation the County might seek to adopt in the future.

The Eleventh Circuit plainly erred when it declined to address this issue — which went to the jurisdiction of the district court — on the ground that it was raised for the first time on appeal. The Court of Appeals was obligated to satisfy itself of its own jurisdiction and that of the district court, even if the issue was not previously raised. Moreover, other circuits have correctly held that a federal court must refuse to enter a defective injunction *even if no party objects*. The Eleventh Circuit also ignored precedents holding that it is proper for appellate courts to consider an argument not presented below where the argument presents a significant question of great public concern, the proper resolution of the issue is beyond reasonable doubt, or a party had no opportunity to raise the issue below. Fulton County's overbreadth argument easily met these conditions. Accordingly, the Eleventh Circuit improperly failed to address that argument, and this Court's review is necessary to address that failure.

Finally, as to the second question presented, allowing even a properly tailored injunction — limited to enjoining the 1994 MFBE Program — would contravene decisions of this Court and other circuits. This Court has held that a challenge to the validity of a statute that has expired becomes moot when the statute expires by its own terms. *Burke v. Barnes*, 479 U.S. 361 (1987). Because the 1994 MFBE Program expired pending appeal, any issues arising from its application are therefore moot. A decision of the Second Circuit also requires a conclusion that even a properly tailored injunction would be moot because the challenged contracting program has expired. *City of New Haven*, 41 F.3d 62. Moreover, in light of *Burke*'s teaching that a challenge to the validity of a statute that has

expired should be treated no differently from a challenge to a statute that has been repealed, *see* 479 U.S. at 363, any decision upholding an injunction against the expired 1994 MFBE Program would conflict with the decisions of this Court and six other circuits that have held that a challenge to a statute is moot once the statute is repealed or amended. *See United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 559-60 (1986); *Kentucky Right of Life, Inc. v. Terry*, 108 F.3d 637, 644-45 (6th Cir. 1997); *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 347-49 (D.C. Cir. 1997); *Jones v. Temmer*, 57 F.3d 921, 922 (10th Cir. 1995); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509-11 (9th Cir. 1994); *Harrison & Burrowes Bridge Constructors, Inc.*, 981 F.2d at 58-61; *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1247-48 (4th Cir. 1991).

I. THE ELEVENTH CIRCUIT'S DECISION UPHOLDING AN INJUNCTION THAT PROHIBITS FULTON COUNTY FROM EVER CONSIDERING RACE, ETHNICITY, OR GENDER IN FUTURE COUNTY CONTRACTING CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, AND IMPROPERLY LIMITS THE DISCRETION OF A LOCAL GOVERNMENT.

The decision of the Eleventh Circuit upholding an injunction that permanently forbids a local government from considering race, ethnicity, or gender in future government contracting squarely conflicts with the decisions of several other circuits. Unlike the Eleventh Circuit, those circuits have recognized that (1) once an existing affirmative action program has been declared unconstitutional and its enforcement enjoined, a broader injunction against future affirmative action

programs improperly exceeds the scope of the constitutional violation it purports to remedy; and (2) the constitutionality of an affirmative action plan depends on the factual justification offered for that plan, so that local governments are free to enact new plans supported by new data even when the factual justification for a previous plan was insufficient. This Court's prompt review is necessary to resolve this conflict. The issue presented is an important one — by effectively requiring Fulton County to preclear any affirmative action plan with a federal court, the Eleventh Circuit's decision severely threatens the discretion invested in local governments, which are charged with the duty to address discrimination. Finally, the Eleventh Circuit's failure even to consider Fulton County's challenge to the scope of the injunction was plainly erroneous and only increases the importance of review in this case.

1. First, the decision below conflicts with a recent decision of the Sixth Circuit, which held that an injunction virtually identical to the one at issue here exceeded the scope of the constitutional violation it purported to remedy, and thereby inappropriately limited city officials' discretion. *See City of Columbus*, 172 F.3d at 418. As a general matter, of course, "injunctive relief must be tailored to fit the nature and extent of the established violation." *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984); *see also Waldman Publisher Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993). Courts have not hesitated to set aside injunctions that "impose unnecessary burdens on lawful activity." *Waldman*, 43 F.3d at 785. This is particularly true of injunctive relief against state and local officials, whose discretion must not be unnecessarily constrained by federal courts. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986).

In *City of Columbus*, the Sixth Circuit applied these principles and vacated an injunction to the extent that it prohibited not only an existing minority- and female-owned business set-aside program, but also any new set-asides adopted without court approval. *See* 172 F.3d at 415. The Sixth Circuit held that a district court lacks jurisdiction to enter such a broad injunction. *See id.* at 415-18. Although the Sixth Circuit acknowledged that Article III equity jurisdiction might authorize a federal court, once it has found a constitutional violation by a governmental entity, to administer expansive remedial orders, *see id.* at 417, it emphasized that "[t]his use of equitable power . . . has been confined to those circumstances in which the . . . mere cessation of the particular activity or method of operation will not serve to remedy the [constitutional] violation." *Id.* Once the existing set-aside program had been declared unconstitutional and its enforcement enjoined, however, the city no longer had any set-aside program. *See id.* at 419. In the absence of any condition violating the Constitution, the trial court's order could not be characterized as a remedial order within its equity jurisdiction. *Id.*; *see also id.* at 418 ("'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation'") (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)).

The Sixth Circuit went on to observe that the "plaintiffs' real grievance is not simply with the particular set-aside ordinance; their real contention is that the City cannot, consistent with the requirements of *Croson*, adopt *any* set-aside program." *Id.* at 415 (emphasis added) (citing *Croson*, 488 U.S. 469). But whatever the "efficiency" of such an approach, the court held that it is "wrong." *Id.* The court emphasized that federal judges may not "'assume to control the discretion with

which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.'" *Id.* (quoting *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481 (1896)). The injunction at issue improperly limited municipal officials' discretion by prohibiting the local government from adopting a new program, and was therefore vacated.

By barring all future consideration of race, ethnicity, or gender in Fulton County's contracting program, and thus permanently forbidding the adoption of any new programs authorizing such preferences (without even providing for the possibility of court approval of a new program, as in *City of Columbus*), the injunction in this case effects an even more severe result than the injunction vacated by the Sixth Circuit. The *only* issue considered at trial and resolved in the district court's decision in this case was "whether Defendant Fulton County's 1994 Minority and Female Business Enterprise ('MFBE') Program is in violation of the Equal Protection Clause." Pet. App. 2a. Thus, enjoining the 1994 MFBE Program would have eliminated the only constitutional violation found here. But the injunction issued by the district court and upheld by the Eleventh Circuit goes much further, permanently prohibiting all future County programs that attempt to ameliorate past discrimination and effectively requiring Fulton County to preclear any future MFBE program with a federal court. Under the Sixth Circuit's decision in *City of Columbus*, such a broad prohibition is not a remedial order within the court's Article III equity jurisdiction. *See* 172 F.3d at 417. This Court's review of the Eleventh Circuit's decision is necessary to reconcile these directly conflicting rulings.

2. The Eleventh Circuit's decision also conflicts with decisions of the Second Circuit recognizing that the constitutionality of an affirmative action plan depends on the statistical data supporting that plan, leaving local governments free to enact new plans supported by new data even if the factual justification for a previous plan was insufficient. In *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, the Second Circuit stated that "[i]n the context of race-based set-asides, *Croson* makes clear that the constitutionality of any municipal plan is inextricably linked to its factual justification." 41 F.3d at 66; *see Croson*, 488 U.S. at 509-10. The Second Circuit went on to hold that the expiration of the challenged set-aside program mooted the case, since the City of New Haven had neither repealed its plan to avoid an adverse judgment nor reenacted the same or a similar plan. 41 F.3d at 66.[2] Moreover, any *new* plan enacted by the City of New Haven presumably would "be supported by updated statistical data and therefore be subject to attack and justification on different and additional grounds." *Id.*; *see also id.* ("the Supreme Court's decision in *Croson* makes it unreasonable to expect that [the expired program] will be reenacted without an updated factual predicate"). Similarly, in *Harrison & Burrowes Bridge Constructors, Inc.*, 981 F.2d at 60, the Second Circuit emphasized that "whether [the state's new minority business] program . . . will survive scrutiny under *Croson* cannot be decided until the bases for adopting particular set-asides are known and the state proceeds to enforce them."

By upholding an injunction that prohibited Fulton County not only from enforcing the existing 1994 MFBE Program, but also from adopting a new plan based on new data, the Eleventh

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[2]As discussed below, the same is true in this case. *See infra* Part II.

Circuit flouted these principles. The relevant inquiry under *Croson* was whether Fulton County could demonstrate a "strong basis in evidence" to support *the 1994 MFBE Program*. Pet. App. 17a. The district court concluded that the County had failed to carry this burden. *See, e.g.*, Pet. App. 51a (evidence "fails to provide a strong basis in evidence for the 1994 MFBE Program"); Pet. App. 54a-55a (same). Under the Second Circuit's decisions — indeed, under any reasonable analysis — that conclusion could not prevent Fulton County from undertaking *additional* studies and asserting in the future, based on new factual evidence, that a "strong basis in evidence exists" for a revised program. But the trial court's injunction precludes Fulton County from doing so, even though the County is obligated to address discrimination it determines exists. This Court's review is plainly warranted to reconcile these conflicting decisions.

3. The issue presented here is an important one with far-reaching implications. The injunction upheld by the Eleventh Circuit severely threatens the legislative discretion invested in local governments — which are charged with the duty to address discrimination — to craft remedial schemes and adopt contracting programs that do not perpetuate discriminatory patterns. *See generally Croson*, 488 U.S. at 509 ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."). That injunction effectively requires Fulton County to preclear any affirmative action plan with a federal court, in violation of the principle that federal courts may not interfere with, or restrain in advance, legislative activity by municipal bodies. *See City of Columbus*, 172 F.3d at 415-18; *see also Association of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995) (vacating portion of injunction that "intru[ded] upon the operations of

state government" and thereby "failed to exhibit an adequate sensitivity to the principle of federalism"); *cf. Younger v. Harris*, 401 U.S. 37, 53 (1971) ("it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process"). And it does so despite *Croson*'s lesson "that the constitutionality of any municipal plan is inextricably linked to its factual justification." *City of New Haven*, 41 F.3d at 66; *see Croson*, 488 U.S. at 509-10.

This Court's review of this issue is necessary to protect sovereign bodies from such unjustified and open-ended interference from federal courts, and to provide guidance to local governments seeking to remedy discrimination without running afoul of the law.

4. Finally, the Eleventh Circuit erred when it declined even to address these issues on the ground that Fulton County's overbreadth argument had been raised for the first time on appeal. *See* Pet. App. 1a. That argument goes to the jurisdiction of the district court. *See City of Columbus*, 172 F.3d at 415-18 (holding that a district court lacks jurisdiction to enter an injunction permanently barring all use of racial or gender goals in connection with awarding contracts). Because an appellate court must satisfy itself not only of its own jurisdiction but that of the lower courts, even if the issue has never been raised previously, *see, e.g.*, *In re Davis*, 899 F.2d 1136, 1138 n.5 (11th Cir. 1990), the Eleventh Circuit was obligated to address Fulton County's jurisdictional challenge to the scope of the injunction.

Indeed, an injunction as broad as that issued by the district court has such sweeping consequences that, as the Seventh Circuit has held, "a district judge has not only the power but also the duty to refuse to enter a defective injunction even if

neither party objects." *Chicago & Nw. Transp. Co. v. Railway Labor Executives' Ass'n*, 908 F.2d 144, 149 (7th Cir. 1990). Such an injunction "imposes burdens on the court that issues it and potentially affects the rights of third parties; on both grounds the court has a duty independent of the desires of the parties to assure that the injunction is proper." *Id.*; *see also ACORN*, 56 F.3d at 797. Accordingly, review of the scope of a far-reaching injunction is necessary and appropriate, even where no challenge to its breadth was raised in the district court. *See Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 146 F.3d 350, 360 (6th Cir. 1998) (reviewing challenge to nationwide geographic scope of injunction although issue was not raised below); *see also ACORN*, 56 F.3d at 796-98 (vacating portion of overbroad injunction despite parties' failure to raise issue).

The impact of the injunction in this case is especially severe. The injunction precludes a municipal government from ever taking any action to eradicate the effects of past discrimination, and places control over a government's legislative and policymaking functions in the hands of a federal court — a result that the Sixth Circuit has deplored. *City of Columbus*, 172 F.3d at 415; *see also ACORN*, 56 F.3d at 798 (vacating portion of injunction that "intru[ded] upon the operations of state government" and thereby "failed to exhibit an adequate sensitivity to the principle of federalism"). Moreover, it concerns a matter of substantial public concern: the amelioration of past discrimination. Thus, the Eleventh Circuit's failure to address this issue was plainly erroneous.

That failure also conflicts with controlling precedent of this Court, which has held that a federal appellate court has full authority to consider issues not presented to the district court where the proper resolution is beyond any doubt or where

"'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).[3] For the reasons discussed above, *see supra* at 16-17, whether or not an injunction may prevent a local government from adopting any race- or gender-conscious contracting measures without first clearing those measures with a federal court is plainly a significant issue of great public concern. And the resolution of that issue is beyond all doubt: The injunction in this case is overbroad and must be struck down. *See supra* at 12-16.

Finally, the County had no meaningful opportunity or reason to challenge the scope of the injunction in the district court. *See* Fed. R. Civ. P. 46 ("[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party."). The parties presumed throughout the district court proceedings that any injunction would be limited to the 1994 MFBE Program, and the court gave no indication before entering final judgment that it would deviate from that assumption — to the contrary, the court confirmed the parties' presumption. *See supra* at 6-7. Thus, Fulton County had no opportunity or reason to argue that an injunction prohibiting it from *ever* using ethnic or gender

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[3]Similarly, the Eleventh Circuit has held that an appellate court may consider an issue presented for the first time when "the appellant had no opportunity to raise it below" or when "the issue presents significant questions of great public concern." *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993); *see also Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994) (exercising discretion to consider issue on appeal that was not raised below). In the instant case, the Eleventh Circuit inexplicably ignored these precedents.

participation goals in awarding contracts would be impermissibly overbroad.[4]

Accordingly, the Eleventh Circuit's refusal to address the overbreadth issue denied the County *any* consideration by *any* court of its argument that an injunction purporting to bar more than the 1994 MFBE Program was overbroad. For this additional reason, this Court should review the judgment below and address the merits of the County's overbreadth argument.

II. THE DECISIONS OF THIS COURT AND OTHER CIRCUITS MAKE CLEAR THAT BECAUSE THE CHALLENGED PROGRAM HAS EXPIRED AND NO NEW RACE- OR GENDER-CONSCIOUS PROGRAM HAS REPLACED IT, EVEN A PROPERLY TAILORED INJUNCTION WOULD BE MOOT.

The decisions of this Court and other circuits make clear that even a properly tailored injunction — limited to the 1994 MFBE Program — would be moot. The 1994 MFBE Program expired automatically in September 1999. *See supra* at 5. Although the Board was authorized to extend it for five years if a new disparity study showed a continuing need for it, no such study was done, and the Board did not renew the Program. *Id.* No race- or gender-conscious contracting plan has replaced the Program. Therefore, Green Thumb's claims for injunctive and declaratory relief are plainly moot, and the Eleventh Circuit should have vacated the injunction. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual

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[4]Nor was the County required to present such an argument to the district court in a post-judgment motion; the injunction was part of a final judgment that could not have been more clear.

controversy must be extant at all stages of review.") (quotation and citation omitted). The Eleventh Circuit's failure to do so merits this Court's review.

1. Allowing even a properly tailored injunction to stand in this case would contravene this Court's decision in *Burke v. Barnes*, 479 U.S. 361. In *Burke*, thirty-three individual members of the House of Representatives filed suit challenging the President's action in seeking to pocket-veto a bill that had been passed by both the House and the Senate. *Id.* at 362. After the court of appeals entered judgment that the bill had become a law notwithstanding the President's attempt to pocket-veto it, but before this Court decided its review of the case, the bill expired by its own terms. *Id.* at 363. This Court explained that, under *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 414-15 (1972) (per curiam), declaratory and injunctive relief is "inappropriate" where a challenged statute has been repealed. The Court then held: "We see no reason to treat a challenge to the validity of a statute that has expired any differently from a challenge to the validity of a statute that has been repealed, and accordingly hold that any issues concerning whether H.R. 4042 became a law were mooted when that bill expired by its own terms." *Burke*, 479 U.S. at 363. Similarly, because the 1994 MFBE Program expired automatically, any issues arising from its application — including the validity of an injunction against enforcement of that Program — are now moot.

This Court has not recognized any exception to mootness that would alter this result. This is not a case in which the offending legislation has been repealed but may be reenacted in a form similar to its present one. *Compare Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993); *City of Mesquite v.*

Aladdin's Castle, Inc., 455 U.S. 283, 289 & n.11 (1982). Unlike this case, *Florida Associated General Contractors* involved a governmental body that repealed *and reenacted* a challenged minority set-aside ordinance while an appeal was pending in this Court. Similarly, in *Aladdin's Castle*, the proponent of a repealed statute explicitly stated that it intended to reenact the legislation. *See* 455 U.S. at 289 n.11. Moreover, in that case, the City of Mesquite had passed the ordinance challenged in the Supreme Court only *after* a similar law was declared unconstitutional by a Texas state court. *Id.* at 287-89. The 1994 MFBE Program, in contrast, expired by its own terms and has not been replaced with any form of race- or gender-conscious contracting preference, and the County has no history of reenacting, in slightly modified form, statutes that have been found unconstitutional.

Nor is this a case involving "voluntary cessation" of challenged conduct, unaccompanied by a change in legislation. *Compare Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199 (1968); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). In such cases, because there is nothing preventing the defendant from resuming its offending acts, this Court has held that "[v]oluntary cessation of challenged conduct moots a case . . . only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors*, 528 U.S. at 222 (citing *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203) (internal quotation marks omitted). But where — as here — the case involves a statute that expires or is repealed or amended, no such showing is required. Rather, such a case is moot *unless* the challenged legislation is likely to be reenacted in substantially similar

form. *Compare Burke*, 479 U.S. at 363; *Diffenderfer*, 404 U.S. at 414-15, *with Fla. Associated Gen. Contractors*, 508 U.S. at 662; *Aladdin's Castle*, 455 U.S. at 287-89.[5]

The district court did not suggest a contrary result. Its opinion below contains only one reference to the expiration of the Program:

> No evidence was offered of any intention on the part of Fulton County to allow the 1994 MFBE Program to expire. The legality of the Program was vigorously defended at trial. The Court infers from this that the County believes there is a continuing need for the Program and that it will be continued unless enjoined by this Court.

Pet. App. 61a. This statement is not a finding regarding mootness, however; the 1994 MFBE Program had not yet expired at the time of the decision, and no mootness issue was before the court. Rather, the court's statement arose in an entirely different context. The court made the statement in the course of deciding whether the Program was narrowly tailored,

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[5] *Adarand Constructors* does not undermine this conclusion. Although that case also involved a challenge to a set-aside program favoring "disadvantaged businesses," the "voluntary cessation" was a state agency's grant of disadvantaged business status to the plaintiff. *Adarand Constructors*, 528 U.S. at 221-22. The Tenth Circuit assumed that that act mooted the case against the United States Department of Transportation ("DOT") because DOT would accept the state agency's certification for purposes of federal projects. *Id.* This Court disagreed, holding that it was not clear whether DOT would classify plaintiff as a disadvantaged business for purposes of federal contracting. *Id.* at 222-23. Therefore, this Court held, the suit against DOT was not moot. *Id.* No such "voluntary cessation" even arguably exists in this case, where, as in *Burke*, the offending conduct ceased because of the expiration of a challenged statute.

which depends in significant part on an analysis of the preference's duration. *Id.*[6]

Accordingly, because the 1994 MFBE Program has expired, this Court's decision in *Burke* directs that even a properly tailored injunction — limited to enjoining the Program — would be moot. Review is therefore warranted to ensure consistency with this Court's precedents.

2. A decision of the Second Circuit, *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 41 F.3d 62, also requires a conclusion that even a properly tailored injunction would be moot. In that case, the City of New Haven enacted a set-aside for minority- and female-owned business enterprises in 1983. *Id.* at 64. In light of this Court's decision in *Croson*, however, the City created a special committee to determine whether sufficient evidentiary support existed for the 1983 program. *Id.* At about the same time, Associated General Contractors of Connecticut, Inc. challenged the constitutionality of that program. *Id.* at 65. When the City

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[6]Similarly, the district court's comment in its recent opinion on Green Thumb's motion for attorneys' fees and costs that there was evidence that the County would have reenacted the Program absent an injunction has nothing to do with mootness. *See* Pet. App. 123a. The court made that statement in the course of determining whether Green Thumb was a "prevailing party" under 42 U.S.C. § 1988(b) — limited by Eleventh Circuit case law to those who "*conceivably* could benefit" from the court's judgment — so as to be entitled to attorneys' fees. Pet. App. 119a-120a (emphasis added). Applying that standard, the district court found that Green Thumb "conceivably could benefit" from a favorable judgment because "evidence exists" that the injunction altered Fulton County's actions. Pet. App. 123a. The court did not cite any record evidence in support of this statement, however. Moreover, the mootness of the injunction was not at issue, and the court did not purport to make any findings in this regard.

later adopted a similar set-aside ordinance with a three-year sunset provision, the contractors filed an amended complaint seeking declaratory and injunctive relief with respect to this latest legislation. *Id.* The district court granted summary judgment in favor of the plaintiffs in May 1992, but neglected to enter final judgment until August 1993, over a month after the subsequently enacted program would have expired by its own terms had it not been declared unconstitutional. *Id.* The Second Circuit held that the case was moot.

Like the program at issue in *City of New Haven*, the 1994 MFBE Program expired by its own terms pending appeal. As was true of the City of New Haven, Fulton County "did not repeal [the Program] to avoid an adverse judgment and it has not reenacted [the Program] or a similar provision." *Id.* at 66. And even if the County were to enact a new race- and gender-conscious contracting plan, it would have to be supported by updated statistical data, and would be subject to attack and justification on different grounds. *Id.*; *see supra* at 15. As the Second Circuit recognized, "[t]his probability counsels in favor of a finding of mootness." 41 F.3d at 66. Accordingly, because even an appropriate injunction would contravene the Second Circuit's ruling, this Court's review is necessary.

3. *Burke* admonished that a challenge to the validity of a statute that has expired should be treated no differently from a challenge to a statute that has been repealed. *Burke*, 479 U.S. at 363. Thus, a decision upholding a properly tailored injunction in this case would conflict not only with *Burke* and *City of New Haven*, but also with the decisions of this Court and five other circuits that have held that a challenge to a statute is moot once the statute is repealed or amended. *See Galioto*, 477 U.S. at 559-60 (holding challenge to firearm possession statute moot where legislation was amended while

case was under consideration in Supreme Court); *Kentucky Right of Life, Inc.*, 108 F.3d at 644-45 (finding challenge to campaign contribution law moot where law was amended pending appeal); *National Black Police Ass'n*, 108 F.3d at 348-49 (holding that a challenge to a District of Columbia law limiting campaign contributions became moot when the statute was amended to increase such limits); *Jones*, 57 F.3d at 922 (finding challenge to statute moot after it was amended); *Native Village of Noatak*, 38 F.3d at 1509-11 (finding challenge to statute moot after statute was repealed and noting that "[a] statutory change . . . is usually enough to render a case moot, even if the legislature possessed the power to reenact the statute after the lawsuit is dismissed"); *Harrison & Burrowes Bridge Constructors, Inc.*, 981 F.2d at 58-61 (holding challenge to statute moot in light of amendment); *Maryland Highways Contractors Ass'n, Inc.*, 933 F.2d at 1247-48 (finding that repeal of minority set-aside program and subsequent reenactment to comply with *Croson* mooted original challenge).

Because allowing even a properly tailored injunction to stand in this case would directly conflict with these rulings, this Court's review is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 10, 2001

APPENDICES

Appendix A

United States Court of Appeals,
Eleventh Circuit.

Daniel WEBSTER and Peggy Webster, et al., Plaintiffs-Cross-Appellants,
Webster Green Thumb Company, and others similarly situated, Plaintiffs-
Appellees, Cross-Appellants,
v.
FULTON COUNTY, GEORGIA, Defendant-Appellant, Cross-Appellee,
Mike Kenn; Michael Hightower, et al., Defendants-Cross-Appellees.

No. 99-12216.

July 19, 2000.

Before ANDERSON, Chief Judge, and DUBINA and HILL, Circuit Judges.

PER CURIAM:

The judgment of the district court is affirmed on the basis of the opinion of the district court published at 51 F. Supp. 2d 1354 (N.D. Ga. 1999).

AFFIRMED.[1]

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[1] We decline to address appellants' challenge to the scope of the injunction. The argument was not presented to the district court; rather, it was raised for the first time on appeal.

Appendix B

United States District Court,
N.D. Georgia,
Atlanta Division.

Daniel WEBSTER, et al., Plaintiffs,
v.
FULTON COUNTY, GEORGIA, et al., Defendants.

No. CIV. A. 196-CV-2399-TWT.

June 11, 1999.

ORDER

THRASH, District Judge.

This is a race and sex discrimination case brought pursuant to 42 U.S.C. §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment. Beginning on May 11, 1999, the Court conducted a bench trial spanning over six days on the issue of whether Defendant Fulton County's 1994 Minority and Female Business Enterprise ("MFBE") Program is in violation of the Equal Protection Clause. The trial was then adjourned for two days for the Court to review the documentary evidence. The Court heard closing arguments on May 24, 1999. Based on the evidence admitted at trial and the Court's findings of facts and conclusions of law as set forth below, the Court concludes that the 1994 MFBE Program violates the Equal Protection Clause and is therefore unconstitutional.

I. BACKGROUND

The remaining named Plaintiffs in this case are Daniel Webster (white male), Peggy Webster (white female), and The Webster Green Thumb Company ("Green Thumb"). Plaintiff Daniel Webster is the current owner of Green Thumb, a landscaping and tree removal service.. The remaining Defendants are Fulton County and Michael Cooper, former Director of the Department of Contract Compliance and Equal Employment Opportunity ("Department") for Fulton County. As part of their discrimination action, the Plaintiffs allege that Fulton County has operated since September 16, 1994, an unconstitutional affirmative action program, the 1994 MFBE Program. Plaintiffs assert that the 1994 MFBE Program unreasonably and unlawfully burdens and discriminates against businesses based solely on the race and/or sex of the businesses' owners. The Plaintiffs' principal claim is that Fulton County operates an illegal MFBE program that favors minorities and females in the award of contracts for goods and services. The Plaintiffs request a declaratory ruling from this Court that Fulton County's 1994 MFBE Program is unconstitutional. (Doc. 35). They further seek an injunction to forbid further implementation of the 1994 MFBE Program, together with affirmative injunctive relief.

Fulton County adopted its first minority business enterprise program in 1979. The Fulton County Board of Commissioners at that time resolved to begin an affirmative action program with a goal that at least 20% of all County public contracts be awarded to minority bidders. The Board passed resolutions continuing the program in 1984 and 1987. The 1987 resolution established the Office of Contract Compliance and Equal Employment Opportunity. In 1988,

Defendant Cooper was hired as its first Director. In September, 1988, the Board adopted a Female Business Enterprise Resolution and requested a study of discrimination against female business owners. This resulted in the February, 1989, Fulton County Female Business Enterprise Study by Beth Shapiro & Associates and the Coalition of 100 Black Women ("Shapiro Study"). (Def. Exh. 214). In the Shapiro Study, it was noted that "[n]o historical data are available from any source within Fulton County regarding the extent of usage of female businesses by the Purchasing Department because the vendor list does not distinguish female businesses." (*Id.* at iii). This data was not available from any other source within Fulton County. (*Id.* at 24). The Shapiro Study did provide extensive anecdotal evidence of barriers to female businesses in doing business with the County. This evidence included the testimony at a public hearing in October, 1989. At this hearing it was revealed that most of the participants never considered County contracts as a viable source of business for a variety of reasons. These reasons ranged from the types of services female-owned businesses typically provide and the difficulty in mainstreaming these professional services through the purchasing and contracting process to the difficulties associated with any small business such as bonding requirements. (*Id.* at 31). The Shapiro Study recommended the adoption of specific numerical contract goals. (*Id.* at 32). It recommended a goal of 5% without any real explanation as to the goal's calculation. (*Id.* at 33).

In January, 1989, the Supreme Court struck down a municipal minority set-aside program and adopted a strict scrutiny standard of review for such programs in the future. In response, the Board and the City of Atlanta commissioned Dr. Andrew F. Brimmer and Dr. Ray Marshall to conduct a

fact-finding study relating to the participation of minorities and females in the City of Atlanta and Fulton County marketplace. The purpose of the study was to allow the City of Atlanta to reintroduce its minority and female business development program. Drs. Brimmer and Marshall also studied whether discrimination against minority-owned and female-owned business enterprises ("MFBEs") has reduced their participation in the public and private sector contracting and procurement activities in the Atlanta and Fulton County marketplace. In 1990, Drs. Brimmer and Marshall produced and submitted to the County and City of Atlanta the Brimmer-Marshall Study which consisted of eight volumes entitled "Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County." (Def. Exh. 146). Dr. Thomas Boston, an economics professor, prepared a report included in the Brimmer-Marshall Study entitled "Discrimination and Economic Development: Effects on Minority and Female Business Enterprises."

In April and June, 1992, Fulton County conducted open public hearings in which numerous individuals provided further anecdotal evidence regarding their experiences in the Fulton County contracting and procurement activities and practices in the Atlanta/Fulton County marketplace. On October 21, 1992, the Board passed a resolution accepting the findings of the Brimmer-Marshall Study. This resolution also authorized a Female Business Enterprise Program and adopted the 5% goal recommended by the Shapiro Study. The Board then passed another Resolution that authorized the implementation of a MFBE Program under the auspices of Defendant Cooper as the Director of the Department. (Def. Exh. 200). The 1992 MFBE Program utilized minority and female participation goals of 25% for African-Americans, 1% for Hispanics, 1% for Asian-Americans, 1% for Native

Americans and 5% for female business enterprises. (Def. Exh. 204, p. 19).

In 1994, the Board engaged Dr. Boston to conduct a post-disparity study. Dr. Boston submitted this Post-Disparity Study to the Board in June, 1994. (Def. Exh. 21). On June 15, 1994, the Board approved and adopted Dr. Boston's Post-Disparity Study on June 15, 1994. The Board then directed that the Department implement amendments to the MFBE Program based on the Post-Disparity Study. On July 20, 1994, the Board passed a resolution adopting certain amendments to the MFBE Program based upon the Post-Disparity Study. The Program became effective on September 16, 1994.

The stated purpose of the 1994 MFBE Program was to alleviate the effects of past and present discrimination against minority and female business enterprises and to enhance contracting opportunities for minority and female businesses. (Pl. Exh. 1 at 1, 10). The 1994 MFBE Program provides that it shall expire five years from its effective date. (*Id.* at 55). As stated in the 1994 MFBE Program, the Board "considered and determined that there are no reasonable race and gender neutral alternatives or policies available which alone will accomplish the amelioration and remedy the effects of past and present discrimination." (*Id.* at 9). The 1994 MFBE Program sets forth the following annual business participation goals for the following groups: (1) African-American business enterprises – 26%; (2) Hispanic business enterprises–1%; (3) Asian-American business enterprises–1%; (4) Native American business enterprises–1%; and (5) Female business enterprises–6%. (*Id.* at 16-17).

The 1994 MFBE Program provides that these goals are in effect for five years and are subject to an annual review and adjustment by the Department and approval by the Fulton County Manager and Board. (*Id.* at 17). Pursuant to the MFBE Program, the participation goals for minority and female business enterprises are not considered to be fixed quotas. (*Id.* at 19). The participation goals for each project or contract are set by the Department's Director based on the following non-exclusive list of factors: (1) the number of minority and female business enterprises known to be available for the type and value of service to be obtained; (2) a forecast of all eligible contracts to be awarded within the coming fiscal year, specifying the type and value of goods and services to be obtained; (3) the minority and female business enterprise percentages of the total number of business entities known to be available for the type and value of goods and services to be obtained; (4) the statistical and data sources by which each goal was calculated; and (5) the statistical and data sources from the 1994 Post-Disparity Study. (*Id.* at 18-19).

The 1994 MFBE Program further provides that the good faith efforts of a potential contractor to meet minority and female business participation goals shall be considered in deciding contract awards. (*Id.* at 19). These good efforts include, but are not limited to: (1) attendance at pre-bid meetings which are scheduled to inform minority and female business enterprises of prime and subcontracting opportunities; (2) advertisements in general circulation media, trade association publications, and minority and female enterprise media to provide notice of opportunities; (3) written notice to known minority and female business enterprises soliciting their interest in opportunities; (4) efforts made to select portions of work for minority and

female businesses subcontracting in areas likely to be successful; (5) efforts to negotiate with minority and female businesses for specific subcontracting; (6) efforts made to assist minority and female businesses to meet bonding, insurance, or other governmental contracting requirements; (7) a statement of reasons why a particular minority or female business enterprise contacted is not qualified for a contract; and (8) communication with the Department seeking assistance for identifying minority and female business enterprises. (*Id.* at 19-20, 34-35).

The MFBE Program applies "to the totality of Fulton County procurement and contracting, including construction and the acquisition of all commodities, equipment, goods and services (including professional services), however titled and irrespective of the modality or manner procured, and irrespective as to whether purchased or leased." The initial categories established by the Board that were encompassed under the MFBE program are listed as (1) construction; (2) commodities; (3) services; and (4) professional services. (*Id.* at 22-23). Fulton County reserved the right to amend these categories upon recommendation by the Fulton County Manager and the Board. (*Id.* at 22).

The 1994 MFBE Program provides that the Department shall evaluate and set appropriate minority or female business participation goals for each specific project or contract. (*Id.* at 25). The Department should consider (1) the nature of the project or contract and the relevant specifications; (2) the availability of minority and female business enterprises in various industry classifications and professions which are ready and able to provide goods and services on the particular project or contract; (3) the level of participation of such firms on past projects or contracts awarded by Fulton County; and

(4) other relevant factors. (*Id.* at 26). The MFBE Program proposes several methods to achieve the minority and female business participation goals as follows:

(1) *Minority and Female Business Enterprise Solicitations on Procurement Purchase Orders*. For all purchases, each Fulton County buyer and any other Fulton County employee having the authority to procure is required to contact at least one minority or female business enterprise bidder.

(2) *Joint Ventures Program*. The Department shall encourage, where economically feasible, establishment of joint ventures and mentor protégé programs to insure prime contracting opportunities for minority or female business enterprises on eligible projects. If the prime contractor is a minority or female business enterprise or a joint venture between minority and female firms, subcontracting participation with minority and female business enterprises shall be required on all projects exceeding $10,000,000.

(3) *Mentor/Protégé Ventures*. The Department encourages mentor/protégé programs to assist individual minority and female business enterprises in financing, bonding, construction management and technical assistance.

(4) *Minority and Female Business Enterprise Subcontracting and Supplier Purchasing Goals on Construction Projects and Other Contracts*. The Department shall ensure the maximum practicable opportunity for minority and female business participation by requiring that all bidders on a designated project or contract comply with certain remedial measures.

(5) *Construction Subcontracting.* The Department may impose a requirement that bidders wanting to serve as prime contractors on a bid for a Fulton County construction project identified under Program Scope shall subcontract with minority and female business enterprises for a stated percentage of the dollar value of the project.

(6) *Subcontractor Participation.* Where a prime contractor utilizes one or more subcontractors to satisfy its minority or female business participation commitment, the prime contractor may count only expenditures to minority and female business enterprise contractors that perform a commercially useful function in the contract work.

(7) *Suppliers Participation.* Where a prime contractor utilizes one or more suppliers to satisfy its minority or female business participation commitment, credit will be given toward the applicable goal as follows: (1) 100% of the contract amount for minority and female business suppliers who manufacture the goods supplied; (2) 100% of the contract amount for minority and female business suppliers who are wholesalers warehousing the goods supplied; and (3) where an extraordinarily large portion of the contract price is for equipment or supplies, a lower project goal may be set than otherwise would be required.

(8) *Professional Services.* Where Fulton County requires the utilization of professional consultants, the Department shall make knowledgeable and available minority or female business enterprises aware of opportunities to serve as primary consultants on bids.

(*Id.* at 27-33).

The 1994 MFBE Program provides that the Department's Director may grant administrative waivers where reasonable good faith efforts are established, where the situation is deemed to be an emergency, and where deemed appropriate by the Director, the Fulton County Manager and the Board. (*Id.* at 36). A bidder or offeror may seek a partial or total waiver of the project goals. The application for a waiver shall include documentary evidence of the bidder's or offeror's good faith efforts to meet the project goals and why the request should be granted. (*Id.* at 37).

The 1994 MFBE Program contains a section entitled "Race and Gender Neutral Business Opportunity Assistance Measures." (*Id.* at 39). In this section, the 1994 MFBE Program provides that the Department has developed a comprehensive and multifaceted Outreach Program in an effort to increase participation among MFBEs in the Fulton County bid process. (*Id.* at 40). The section also lists several other race and gender neutral opportunity business measures consisting of the following: (1) the Fulton County Purchasing Department, with the assistance of the Department, shall investigate the extent to which non-competitive procurement modalities such as sole source, multi-year, blanket and emergency purchases have been utilized excessively or unnecessarily to the detriment of competition; (2) the Department, Purchasing Department, Project Management Department, and using departments shall identify large Fulton County contracting opportunities to determine whether they may be segmented into two or more smaller bids to provide increased contracting opportunities for small businesses; (3) the Purchasing Department shall determine whether it is appropriate to segment multi-bids to provide increased procurement opportunities for MFBEs who may not have submitted bids on all items requested; (4) the

Department and other appropriate departments will conduct seminars and workshops on how to do business with Fulton County; (5) the Department will work closely with local governmental entities in providing bonding assistance; (6) the Department shall assist small businesses in locating available financial resources within the Atlanta area; (7) the Department shall act as a clearinghouse for information on financial assistance programs for small businesses; (8) the Department will offer services to assist small businesses in construction management and technical services; (9) when a contract or service award has been made, the Department's Director and the purchasing agent shall furnish, upon request, a letter to the contractor stating the information that may be utilized by the MFBE to establish lines of credit with lending institutions and manufacturers; (10) Fulton County may make special provisions for reasonable progress payments during the performance of a contractual obligation by small MFBEs; and (11) Fulton County shall enforce all existing policies and regulations relating to the prompt payment of its bidders. (*Id.* at 40).

The 1994 MFBE Program provides that all firms participating as either a minority or female business enterprise must be certified before the award of a bid or execution of a contract after review and evaluation as to compliance. (*Id.* at 45). In determining whether a firm is eligible to be certified, any minority or female firm engaged in or attempting to engage in business in the Fulton County Metropolitan Statistical Area before July 20, 1994, is rebuttably presumed to have suffered past racial or gender discrimination and is therefore an eligible minority or female business enterprise. In order to be a certified minority or female business enterprise, the firm or joint venture must comply with certain eligibility standards regarding minority

or female control and ownership of the firm or joint venture. (*Id.* at 47-49). The Department reviews whether there is sufficient minority or female operational or managerial control so that the firm can be certified. (*Id.* at 49-51).

The 1994 MFBE Program provides an appeals process for any contractor, bidder or offeror who has been denied certification as an MBE or FBE or against whom a determination has been made of non-compliance with the program policy requirements. (*Id.* at 51-52). A notice of appeal must be filed with the Department's Director who will then forward the notice to the Department's Hearing Officer. (*Id.*). The Department's Hearing Officer, after conducting a hearing, will then issue a decision either affirming, altering or reversing the determination of non-compliance or denial of certification by the Department's Director. The Invitation to Bid/Request for Proposal used by Fulton County lists the "requirements for all bidders interested in doing business with Fulton County." (Pl. Exh. 2). Item 28 of the requirements states that: "Fulton County has a minority and female business enterprise participation program. Failure to comply with this program may result in rejection of a bid." (*Id.*). The foregoing historical facts are undisputed. To the extent that decision of the case requires resolution of factual disputes, those matters are discussed below.

II. DISCUSSION

The present action was filed in 1996. The Plaintiffs, in part, challenge the constitutionality of Fulton County's 1994 MFBE Program and seek a declaratory judgment and an injunction against the further implementation of this program. Based on the evidence admitted at the bench trial, the Plaintiffs contend that Defendant Fulton County has failed to

demonstrate either a compelling or important governmental interest in using racial or gender classifications as a basis to award contracts. They contend that Fulton County has failed to show sufficient evidence of actual discrimination, whether active or passive, to justify any program of racial or gender preference. The Plaintiffs further contend, based upon the admitted evidence, that the race and gender-conscious 1994 MFBE Program is not narrowly tailored to remedy specifically identified discrimination. The Defendants contend that the Fulton County 1994 MFBE Program is constitutional based on evidence identifying past discrimination against minority and female business enterprises. Based on the evidence admitted, the Defendants contend that Fulton County had a compelling interest in remedying past discrimination and that Fulton County properly considered and implemented race and gender-neutral remedies. The Defendants contend that the 1994 MFBE Program is narrowly tailored to remedy past discrimination based on its flexibility toward reaching goals and its graduation, waiver and sunset provisions.

A. STANDING

At various times during the pendency of this action, the Defendants have questioned whether the Plaintiffs have standing to bring their constitutional claims. At the bench trial, the Defendants again challenge whether any of the Plaintiffs (Green Thumb, Daniel Webster, and Peggy Webster) have standing to challenge the constitutionality of the 1994 MFBE Program. The Defendants also contend that the Websters have no standing to challenge the remaining constitutional claims. The Court concludes that Green Thumb has standing to challenge the program based on the evidence admitted at the bench trial and the reasons stated in

the Court's order addressing the parties' summary judgment motions. In addressing an affirmative action set-aside program for contractors' services, the Supreme Court has stated that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program ... need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing.

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Fla., 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586 (1993). The Plaintiff Green Thumb has demonstrated that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing. (Pl. Exh. 1, 206, 207). The Plaintiffs acknowledge that Daniel and Peggy Webster have no standing to challenge the constitutionality of the 1994 MFBE Program. The Court will reserve ruling on

whether the Websters have standing to assert a claim for monetary damages.[1]

B. LEGAL STANDARDS FOR SCRUTINIZING PREFERENCE PROGRAMS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. The Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), has set forth the constitutional standard applicable for programs establishing racial or ethnic preferences. The Court applied the strict scrutiny test, which requires a "searching judicial inquiry into the justification" for the preference to determine whether the classifications are remedial or "in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493, 109 S. Ct. at 721. The strict scrutiny test is therefore designed to expose "illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and to "ensure that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

Accordingly, the strict scrutiny test requires that racial or ethnic preference programs "must be based upon a 'compelling governmental interest' and must be 'narrowly tailored' to achieve that interest." *Engineering Contractors*

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[1] Because Green Thumb is the only Plaintiff with standing to challenge the constitutionality of the 1994 MFBE Program, the Court will refer herein to Green Thumb as "Plaintiff."

Assoc. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 906 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004, 118 S. Ct. 1186, — L. Ed. 2d — (1998) (citation omitted). Explicit racial preferences may not be used except as a "last resort." *Id.* at 926. To uphold a racial or ethnic preference program, the district court must first make a factual determination that a strong basis in evidence exists to support the conclusion that the remedial racial or ethnic program is necessary. *Croson*, 488 U.S. at 500, 109 S. Ct. at 725; *Engineering Contractors*, 122 F.3d at 906. General, amorphous claims of societal discrimination, simple legislative assurances of good intention, or congressional findings of discrimination in the national economy are not sufficient to establish a "strong basis in evidence." *Engineering Contractors*, 122 F.3d at 907. Racial or ethnic preference programs, however, can be justified by demonstrating gross statistical disparities between the proportion of minorities hired for projects or contracts, and the proportion of minorities willing and able to do the work. *Id.* Anecdotal evidence may be used to establish discrimination, especially if buttressed by relevant statistical evidence. *Id.* Accordingly, in this case, if Fulton County can show that it has become a " 'passive participant' in a system of racial exclusion practiced" in connection with the awards of projects and contracts in the county, the Supreme Court has made it "clear that the [county] could take affirmative steps to dismantle such a system." *Croson*, 488 U.S. at 492, 109 S. Ct. at 721.

If there is a strong basis in evidence to justify a race or ethnic conscious program, the next step requires courts to consider whether the program is sufficiently narrowly tailored to achieve that interest. Racial and ethnic preferences must be a "last resort" option. *See Engineering Contractors*, 122 F.3d

at 926. Such programs must be "vigorously scrutinized to ensure that they do not go too far." *Id.* at 927. The following four factors, as identified by the Eleventh Circuit, provide a useful analytical structure for determining whether a race or ethnicity-conscious program is narrowly tailored: (1) necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact on the rights of innocent third-parties. *Engineering Contractors*, 122 F.3d at 927.

Intermediate scrutiny is the applicable constitutional standard for analyzing programs that establish gender preferences. *Engineering Contractors*, 122 F.3d at 907-08. Thus, to withstand constitutional challenge to a gender preference program, such gender preference must serve important governmental objectives and be substantially related to achievement of those objectives. *Id.* The proponent of a gender preference program must present sufficient probative evidence of discrimination. *Id.* at 910. The Eleventh Circuit recognized that the "sufficient probative evidence" standard is less stringent than the "strong basis in evidence" required to bear the weight of a race or ethnic preference program. Id. at 909-10. The following guidelines set forth the boundaries of intermediate scrutiny evidentiary analysis: (1) the local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself; and (2) such review "is not to be directed toward mandating that gender-conscious affirmative action is used only as a 'last resort'." *Id.* at 910. "Under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of women in the market." *Id.* at 929.

In making its factual determination that either a "strong basis in evidence" or "sufficient probative evidence" exists to support the necessity of an affirmative action program, the court may consider post-enactment evidence in addition to pre-enactment evidence. *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 943 F. Supp. 1546, 1557 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (1997). Pre-enactment evidence pertains to evidence developed before Fulton County enacted the MFBE Program, and thus, could have been relied upon by the Board in adopting the MFBE Program. *Id.* Conversely, post-enactment evidence pertains to evidence developed after the MFBE Program was enacted and was therefore not relied upon as a rationale for the program. *Id.* The Eleventh Circuit has held that post-enactment evidence may be introduced into the record to determine the constitutionality of a race or gender preference program:

> Although *Croson* requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer must have already proved that it has discriminated. On the contrary, formal findings of discrimination need neither precede nor accompany the adoption of affirmative action.

Engineering Contractors, 122 F.3d at 911 (*quoting Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994)). Consideration of post-enactment evidence is appropriate when scrutinizing race or gender preference programs because a violation of either federal statutory or constitutional requirements arises when the wrong is committed, and not with the making of a finding.

Engineering Contractors, 122 F.3d at 911 (*citing Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 289, 106 S. Ct. 1842, 1855, 90 L. Ed. 2d 260 (1986) (O'Connor, J., concurring)). Consideration of post-enactment evidence is especially appropriate where the principal relief sought is injunctive relief. *Engineering Contractors*, 122 F.3d at 911.

The Defendants bear the initial burden of production to demonstrate a "strong basis in evidence" or "sufficient probative evidence" that the race, ethnic or gender preference program aims to remedy past or present discrimination and is constitutional under the Fourteenth Amendment. *Engineering Contractors*, 122 F.3d at 916; *Concrete Works of Colorado, Inc. v. City And County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004, 115 S. Ct. 1315, 131 L. Ed. 2d 196 (1995). Notwithstanding this initial burden of proof, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Concrete Works*, 36 F.3d at 1522 (*quoting Wygant*, 476 U.S. at 277-78, 106 S. Ct. at 1849). As explained by the Eleventh Circuit in the context of public employment, once the proponent of a race preference plan:

> introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority [employees] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [public employer's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan

instituted on the basis of this evidence was not sufficiently "narrowly tailored."

Howard v. McLucas, 871 F.2d 1000, 1007 (11th Cir. 1989) (*quoting Wygant*, 476 U.S. at 293, 106 S. Ct. at 1856 (O'Connor, J., concurring)). When statistical evidence is sufficient to support an inference of discrimination, the Plaintiff has at least the following three methods to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant or actionable; or (3) present conflicting statistical data. *Engineering Contractors*, 122 F.3d at 916.

Before examining whether the 1994 MFBE Program passes constitutional muster based on the admitted evidence, it is instructive to analyze the decisions in *Croson* and *Engineering Contractors*. In those cases, the Supreme Court and the Eleventh Circuit analyzed programs with some similar characteristics to the 1994 MFBE Program. In *Croson*, the Supreme Court struck down the City of Richmond's minority set-aside program because the City failed to provide a strong basis in evidence establishing past or present discrimination. *Croson*, 488 U.S. at 498-506, 109 S. Ct. at 723-28. The minority set-aside program required majority-owned prime contractors to whom the City awarded construction contracts to subcontract at least 30% of the dollar amount to one or more MBEs. *Id.* at 477-78, 109 S. Ct. at 713. The Supreme Court first found unpersuasive the City's mere declaration that the set-aside program was "remedial." *Id.* at 500, 109 S. Ct. at 725. The Court then discredited the statistical pool used by the City to demonstrate discrimination in the construction industry. Although the City established a disparity between the number of prime

contracts awarded to minority firms and the City's minority population, the Supreme Court found that a more appropriate comparison would be between the number of contracts awarded to minority firms and the number of qualified minority contractors. *Id.* at 501-02, 109 S. Ct. at 725-26. The Supreme Court stated that:

> Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the [locality] could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Id. at 509, 109 S. Ct. at 730 (citations omitted). The Supreme Court further found that national data about discrimination in the construction industry offered little insight into the particular conditions in the City of Richmond. *Id.* at 504, 109 S. Ct. at 727.

Following *Croson*, the Eleventh Circuit in *Engineering Contractors* affirmed the district court's decision declaring the Dade County, Florida's race, ethnic and gender preference programs to be unconstitutional. *Engineering Contractors*, 122 F.3d at 900. Dade County's programs, referred to collectively as MWBE programs, set participation goals of 15% for black business enterprises ("BBEs"), 19% for Hispanic business enterprises ("HBEs"), and 11% for women

business enterprises ("WBEs"). The MWBE programs applied only to construction contracts, the only classes of contracts having participation goals. To justify its programs, Dade County advanced substantial statistical and anecdotal evidence. *Id.* at 911-26. The heart of its statistical analysis consisted of Dade County contracting statistics that compared three factors for its nonprocurement construction contracts: (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of Dade County contracts that were awarded to MWBE firms. *Id.* at 912. The analysis covered two time periods, 1989-1991 and 1993. The Eleventh Circuit concluded that the district court did not err by failing to find a strong basis in evidence of racial and ethnic discrimination based on the disparities between bidder and awardee percentages. *Id.* at 913. Likewise, the Eleventh Circuit found no error with regard to the district court's finding of no sufficiently probative evidence of gender discrimination. *Id.*

Dade County also calculated disparity indexes with regard to the utilization of BBEs, HBEs, and WBEs in the Dade County market by comparing the amount of contract awards a particular group received to the amount it would be expected to receive based on that group's bidding activity and awardee success rate. The Eleventh Circuit found statistically significant underutilization of BBEs, less dramatic underutilization of HBEs, and mixed results as to the utilization of WBEs. *Id.* at 914-16. The Plaintiffs introduced evidence that the disparities in the utilization of MWBEs are better explained by firm size than by discrimination. Dade County then conducted regression analysis to control for firm size. Despite a few unexplained disparities that remained after controlling for firm size, the district court concluded that the demonstrated disparities were better explained by firm

size than by discrimination. *Id.* at 917-18. The Eleventh Circuit did not find this conclusion to be clearly erroneous. *Id.* at 918-19.

Dade County also submitted its statistics to measure the participation of each MWBE group in the County's subcontracting business. The district court found the subcontracting study "insufficiently probative to support the use of race and ethnic preferences and inadequate to support a gender classification." *Id.* at 919-20. The Eleventh Circuit concluded that this finding was not clearly erroneous. *Id.* at 920. Dade County also introduced marketplace data statistics to determine whether meaningful relationships existed between (1) the race, ethnicity and gender of the surveyed firm owners, and (2) the reported sales and receipts of those firms. The study was based on a sample of 586 contractors that had filed a "certificate of competency" with Dade County. The Eleventh Circuit noted that the parameters of the studies' universe necessarily included firms that were unwilling, unable or unqualified to perform Dade County construction contracts. *Id.* at 920-91. The study found statistical unfavorable disparities only with respect to HBEs. The district court found, however, these disparities not to be controlling based on the entirety of the evidence. *Id.* at 921. The Eleventh Circuit did not find the district court's conclusion to be clearly erroneous in light of the problems with the statistical pool. *Id.*

Next, Dade County introduced a statistical analysis of Jon Wainwright which compared construction business ownership rates of MWBEs to those of non-MWBEs and analyzed the disparities in the personal income between MWBE and non-MWBE owners. The study concluded that blacks, Hispanics and women are less likely to own

construction businesses than similarly situated white males, and MWBEs in the construction business earn less money that similarly situated white males. The Eleventh Circuit found this evidence insufficient to show discrimination in light of evidence indicating the tremendous growth of MWBE firms and the fact that firm size better explained the identified disparities. *Id.* at 922-23. Finally, Dade County presented a study by Dr. Andrew Brimmer which was a historical analysis of black-owned construction firms. The study demonstrated the existence of substantial disparities for black-owned construction business receipts for some years, but not others. The Eleventh Circuit noted that the district court had discounted the significance of the unfavorable disparities because the Brimmer Study failed to account for firm size. *Id.* at 923-24. Again, the Eleventh Circuit did not find the district court's view to be implausible. *Id.* at 924.

With regard to the entire body of statistical evidence, the Eleventh Circuit stated that it "cannot hold that the district court clearly erred in finding that the statistical evidence was too weak an evidentiary foundation to bear the weight of any of the MWBE programs under the standards of review applicable to them." *Id.* The Eleventh Circuit also concluded that the anecdotal evidence was insufficient to support the MWBE programs especially without the requisite statistical foundation. *Id.* at 926. Thus, the Eleventh Circuit affirmed the district court's judgment enjoining the operation of the MWBE programs on the grounds that Dade County's failure to establish a constitutionally sufficient evidentiary foundation for the race, ethnic and gender conscious programs. *Id.*

The Eleventh Circuit further concluded that the BBE and HBE programs were not sufficiently narrowly tailored. *Id.* at

927-29. The Eleventh Circuit found that Dade County did not give serious and good-faith consideration to the use of race and ethnicity neutral measures to increase BBE and HBE participation. *Id.* Finally, the Eleventh Circuit noted that the district court erred by drawing "no distinction between its analysis of whether [Dade] County's BBE and HBE programs were narrowly tailored and whether the WBE program bore a substantial relationship to [Dade] County's stated rationale for implementing gender-conscious affirmative action, in response to perceived discrimination against women-owned contractors." *Id.* at 929. The court stated that:

> If the WBE program rested on a sufficient evidentiary foundation, we could not conclude that it would fail the substantial relationship prong of the intermediate scrutiny analysis. However, because the district court did not clearly err in finding that [Dade] County had failed to present sufficient probative evidence in support of its stated rationale for implementing a gender preference program, the district court's error in applying the substantial relationship test does not change the result.

Id.

This Court is bound to follow the precedents set by the Supreme Court and the Eleventh Circuit in this area. The Court is not at liberty to apply its own notions of what is good public policy or its own notions of the appropriate standard for reviewing minority and gender preference programs. The Court's duty is to follow the Constitution and the law as interpreted by the Supreme Court and the Eleventh Circuit. With this understanding of the controlling decisions in *Croson* and *Engineering Contractors*, the Court now turns to the evidence admitted at trial to determine whether the

Fulton County 1994 MFBE Program violates the Equal Protection Clause.

C. "STRONG BASIS IN EVIDENCE" AND "SUFFICIENT PROBATIVE EVIDENCE"

The Defendants have presented two types of evidence in support of the 1994 MFBE Program: (1) statistical evidence and (2) anecdotal evidence. The Court will review the evidence to determine whether the Defendants have demonstrated both the "strong basis in evidence" standard in connection with the race preference program and the less stringent "sufficient probative evidence" standard in connection with the gender preference program.

1. STATISTICAL EVIDENCE

There have been three basic categories of statistical evidence presented to the Court: (1) the 1990 Brimmer-Marshall Study; (2) the 1994 Post-Disparity Study prepared by Dr. Boston; and (3) various statistical studies covering the years 1994-1997.[2] The Court will summarize and analyze each of these categories. Whether considered individually or together, the statistical evidence presented by the Defendants fails to establish a either a strong basis in evidence for a race or ethnic preference or sufficient probative evidence of gender discrimination.

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[2] The Court gives no weight to the purchase order data contained in Def. Exh. 226. The inclusion in this data of purchase orders to public agencies and charities makes the minority to non-minority comparisons meaningless. The figures also do not include minority subcontracts.

a. The 1990 Brimmer-Marshall Study

In 1990, Drs. Brimmer and Marshall produced and submitted to Fulton County and City of Atlanta the Brimmer-Marshall Study. The Study consisted of eight volumes entitled "Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County." (Def. Exh. 146). Overall, the eight-volume study details discrimination against minorities and females based on historical, statistical and anecdotal evidence. In Part I, Drs. Brimmer and Marshall summarize their findings of discrimination in both the private and public Atlanta business sectors. They noted wide-spread discrimination in the larger more lucrative private sector. They found large disparities in public and private contracting opportunities between minority and majority firms. (Def. Exh. 146, Brimmer-Marshall Study, Part I at 88). According to the study, minority firms derived most of their revenue from the public sector, while public firms derived most of their revenues from the private sector. The Brimmer-Marshall Study further noted that there was low participation by minority business enterprises in the City of Atlanta contracting relative to the value of the contracts awarded to non-minority business enterprises. (*Id.* at 99). Dr. Boston prepared Part III of the Brimmer-Marshall Study. He concluded that MFBEs have not experienced equity in private and public markets for the procurement of contracts in Atlanta and Fulton County.

Part I of the study also contained a summary of the statistical analysis comparing the amount of contract dollars going to minority firms to the availability of minority firms in the same year. In the Brimmer-Marshall Study this was presented as a statistical relationship known as the Utilization-Percentage Ratio ("UPR"), or disparity index.

This index is calculated by dividing the utilization of a certain ethnic or gender group by the availability of the same group.[3] It is the ratio of two percentages: the percentage of contracts actually awarded to minority businesses by the percentage of all businesses qualified and willing to perform contracts for Fulton County, who belong to a specific racial, ethnic or gender group. Underutilization is shown by a number smaller than one, and overutilization by a number greater than one. A UPR of .5 means that the racial or gender group in question is only receiving 50% of the contract awards or contract dollars that one would expect; that is, if a race had an availability of 20% and received only 10% of the contract awards or contract dollars, this would generate a disparity index of 0.5, and show underutilization. If an ethnic group had availability of 10% and utilization of 20%, this would generate a disparity index of 2.0 and show overutilization. The Eleventh Circuit has recognized that disparity indexes greater than 80%, or .8, are generally not considered indications of discrimination. *Engineering Contractors*, 122 F.3d at 914. In the years 1972, 1977 and 1982, the UPRs, or disparity indexes, for black-owned businesses for United States, Georgia, the Atlanta Standard Metropolitan Statistical Area ("SMSA") and Fulton County computed under 20% for all industries and under 27% for construction and developers. (*Id.* at 103).

In Part V of the Brimmer-Marshall Study, the authors provided additional statistical analysis in the form of UPR calculations covering the years 1972, 1977 and 1982 for five geographic regions (United States, Georgia, Atlanta SMSA,

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[3] Utilization can be measured in at least two ways: (1) dollars awarded, or (2) number of contracts awarded.

Fulton County, and City of Atlanta). The study analyzed primarily black and minority-owned firms and covered six industrial classifications, including construction, general contractors, trade contractors and land developers. The data was collected from the U.S. Census Bureau's Survey of Minority-Owned Business Enterprises ("SMOBE"). Dr. Jon Wainwright testified at trial that he prepared this part of the Brimmer-Marshall Study. The Brimmer-Marshall Study found consistently low UPR values across all industries in the Atlanta SMSA and Fulton County, even lower than the corresponding UPRs for Georgia and the United States. It must be emphasized that all of this data looks at the marketplace as a whole.

After reviewing the Brimmer-Marshall Study, the Court finds that it is insufficient to establish a strong basis in evidence for the 1994 MFBE Program. There are two flaws in the analysis that are insurmountable. First, the analysis in the Brimmer-Marshall Study proceeds on the premise that a statistical showing of underutilization of minorities in the marketplace as a whole is sufficient proof of discrimination to justify a program of racial preferences by a local government in whatever area is involved. This assumption is directly contrary to Justice O'Connor's analysis in *Croson*. If a statistical showing of underutilization of minorities in the marketplace as a whole is sufficient proof of discrimination to justify a program of racial preferences, such a showing as to the United States as a whole would justify racial preferences by every governing entity in the United States. General claims of societal discrimination in the marketplace are not enough to justify a race or ethnic-conscious program. *See Croson*, 488 U.S. at 499, 109 S. Ct. at 724. In *Croson*, Justice O'Connor was clear that the focus must be on

contracting by the entity that is considering the preference program:

> In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.

Id. at 510, 109 S. Ct. at 730. Dr. Boston has testified that historically minorities have sought public sector work more than majority contractors. The existence of minority preference programs will have the effect of further concentrating minority business efforts in a sector where they have an advantage. For all of these reasons, statistical evidence of underutilization of minorities in the general Atlanta marketplace alone does not show discrimination by Fulton County according to *Croson*.

There is no statistical evidence in the Brimmer-Marshall Study of discrimination by Fulton County government in the award of contracts. Therefore, in order to justify racial preferences, the County must show that it is a "passive participant" in discrimination by the private sector. *Croson*, 488 U.S. at 492, 109 S. Ct. at 721; *Engineering Contractors*, 122 F.3d at 911. The Court does not accept Dr. Marshall's concept of "passive participation" as meaning any

governmental contracting in a marketplace where there is discrimination. On the other hand, the County could take remedial action if it had evidence that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities. *Croson*, 488 U.S. at 509, 109 S. Ct. at 730. The County could take remedial action if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination" that can be identified with specificity. *Id.* at 504, 109 S. Ct. at 727. The Brimmer-Marshall Study contains no statistical data regarding the utilization of minority subcontractors by prime contractors doing business with Fulton County.[4] It does not show that the County's spending practices are exacerbating identified discrimination in the private sector. The County may rely upon a showing of discrimination in the private sector if it provides a linkage between private sector discrimination and the County's contracting policies. *Concrete Works*, 36 F.3d at 1529. No such linkage is provided by the data in the Brimmer-Marshall Study.

The second flaw is there is no statistical analysis of other factors that may affect minority business enterprise availability and utilization. Dr. Marshall testified at trial that the trouble with statistics is that they frequently conceal as much as they reveal. The Brimmer-Marshall Study does set forth statistical analysis showing disparities in the availability of minority and black-owned firms compared to their utilization in terms of dollars awarded. Nevertheless, the study contains no attempt to explain whether the disparity is due to discrimination or other neutral reasons, such as firm

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[4] Such studies have been done. For example, Dr. Boston testified that he has performed such a study for the Georgia Department of Transportation.

size and the ability of a firm to obtain financing and bonding. In Part III, Dr. Boston identifies some of these factors as having a significant impact with regard to the acquisition of public or private contracts. By contrast, Dade County in *Engineering Contractors* sought to explain through regression analyses that the disparities were due to discrimination and not due to any neutral explanations such as firm size. *Engineering Contractors*, 122 F.3d at 917-18. Regression analysis is a statistical procedure for determining the relationship between a dependent and independent variable. The purpose of a regression analysis is to determine which of a number of possible factors ("independent variables") are responsible for a given outcome. The Brimmer-Marshall Study did not utilize regression analysis to determine the cause of the disparities between minority availability and utilization in the marketplace as a whole. The data to do a regression analysis was not available. Dr. Marshall, in his trial testimony, dismissed this issue by saying that there is some residuum of underutilization that is not accounted for by neutral factors. The problem with this response is that the residuum remains unidentified and, following *Croson*, race specific goals cannot be implemented on the basis of generalizations about the existence of and the degree of discrimination. Finally, it is questionable whether Fulton County could rely upon disparities in 1972, 1977 and 1982 to enact a preference program in 1994 when more current data should have been and was available.

At trial, Dr. Marshall submitted into evidence a report showing disparity indices for 1987 and 1992, based on census and SMOBE data. This statistical study, however, was never considered by the Board in implementing the 1994 MFBE Program. This study repeats the flaws of the original Brimmer-Marshall Study by assuming that a showing of

discrimination in the marketplace as a whole is sufficient to comply with *Croson*. The disparity indexes reported cover the United States, Georgia, and Atlanta SMSA regions. They are based on data that examine minority business participation in the overall economy and not just the private sector. (Def. Exh. 235 at 21). The study only reports disparity indexes as to African-American firms and does not reference any other minority group. Again, statistical analysis, like a regression analysis, was not performed to determine whether factors other than discrimination played any role in the underutilization of African-American firms. Applying *Croson* correctly, this data has the same inadequacy as the original Brimmer-Marshall Study. It is apparent from his report and his testimony at trial that Dr. Marshall disagrees with the implications of the *Croson* decision. (Def. Exh. 235 at 32). His criticism of the decision may be valid from a public policy perspective. However, this Court, unlike Dr. Marshall, is bound to follow Supreme Court precedent whatever doubts it may have about the wisdom of its decision.

Overall, the Court finds and concludes that the statistical evidence presented in the Brimmer-Marshall Study fails to provide a strong basis in evidence of discrimination against MBEs to justify Fulton County's racial and ethnic preference program. Given the flaws identified in these statistics, this study fails to show "gross statistical disparities" between the proportion of MBEs hired for projects or contracts, and the proportion of minorities willing and able to do the work for Fulton County. *See Engineering Contractors*, 122 F.3d at 908. Further, the Court finds and concludes that the Brimmer-Marshall Study, which primarily offers statistical evidence as to minority-owned firms, fails to offer sufficient

probative evidence of gender discrimination to justify Fulton County's gender preference program.

b. The 1994 Post-Disparity Study

At the heart of Fulton County's statistical evidence in justifying the 1994 MFBE program is Dr. Boston's 1994 Post-Disparity Study. (Def. Exh. 21). In this Study, Dr. Boston tried to do what was not done in the Brimmer-Marshall Study, that is, to analyze Fulton County's utilization of female and minority contractors in relation to their availability. The 1994 MFBE Program states that the percentage goals for minority and female participation were based in part on methodology suggested by this study. (Pl. Exh. 1 at 17). The 1994 Post-Disparity study evaluated the utilization of minority or female vendors by Fulton County from 1990-1993, the four years immediately preceding the implementation of the program. In the 1994 Post-Disparity Study, Dr. Boston addresses whether there was a significant "disparity index" or "UPI", showing that Fulton County had underutilized minority and female contractors during that period. The conclusion of the study was that "[t]he current goals and utilization percentages are still below the levels that are warranted by the availability of minority and female vendors and by the extent of historical discrimination." (Def. Exh. 21).

The overall disparity index in evidence for the period 1990-93 is reflected in a document entitled "Fulton's UPI Calculation," created by Dr. Boston. (Def. Exh. 2). To calculate disparity indexes for Fulton County contracts, Dr. Boston sets out to determine the availability and utilization of minority and female firms. Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis.

In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period. Dr. Boston's availability calculations relied on the number of firms submitting bids rather than the gross number of bids.

In arriving at his availability percentages, Dr. Boston did not consider any data from Fulton County concerning the race and gender of firms who actually bid for contracts with Fulton County. He wanted to use Fulton County bid data, but he considered the data the County had to be faulty and inaccurate. Instead, he took the results of two previous studies he had performed for the City of Atlanta and the Atlanta School System and averaged them together. Dr. Boston used data covering the years 1978 through 1988 to compute the City of Atlanta availability. The availability figures for the City of Atlanta were derived from the number of different bid applicants over the ten-year period. He then used data for the years 1982 through 1992 to compute the Atlanta School System availability. The availability figures for the Atlanta School System were derived from the number of vendor applicants over the ten-year period. Dr. Boston found that the overall MFBE availability for the City of Atlanta was 28.3% and for the Atlanta School System 42.6%. Thus, the average availability was 35.45%. Dr. Boston then adjusted the availability results by the number of certified MFBE firms certified in Fulton County in 1994, the total number being 699. Dr. Boston's "adjusted" availability for African-Americans was 28.6%, for White Females 3.55%, for Hispanics 1.22%, for Asians 1.83%, and for Native

Americans 0.25%. (Def. Exh. 2; Def. Exh. 21 at Table 19(a)).

In measuring utilization, Dr. Boston relied on data collected from the Fulton County Uniform Contract Sign-Off Sheets. (Def. Exh. 21 at 21, Table 1). Table 1 in the 1994 Post-Disparity Study shows minority utilization of 13.50% in 1990, 24.03% in 1991, 19.12% in 1992, and 23.22% in 1993. This table further shows female utilization of .22% in 1990, .03% in 1991, 1.63% in 1992, and 4.33% in 1993. The table contains the following caveat:

> Women vendors ... means women who are not elsewhere classified, primarily white women. However, a small number of minority women vendors are also included in this total. These women and are [sic] not also included in the minority total.

(*Id.* at Table 1). The utilization figures in this table were calculated by dividing the dollar awards to either minority or women vendors by the total dollar awards that year. Dr. Boston's 1994 Post-Disparity and his "Fulton's UPI Calculation" document reflect that the "Average utilization 1990-93" was 19.63% for "Minority" and 1.43% for "Females". (*Id.* at Table 19(b)).

Table 19(a)-(f) lists the relevant availability and utilization figures used by Dr. Boston to develop the methodology for deriving the one and five year goals of Fulton County. In dividing total minority average utilization by total adjusted minority availability (19.63%/31.90%), Dr. Boston calculates a UPI for the years 1990-1993 of 61.54%. The UPI for majority women (1.43%/3.55%) is calculated to be 40.28%. From these calculations, Dr. Boston sets forth his

recommended goal for minorities at "29% starting in 1995 and increasing by one percentage point over the next five years to 33%." (*Id.* at Table 19(d)). His recommended goal for females is 6% beginning in 1995 and increasing by one percentage point over each of the next five years to 10%. (*Id.*). In order to determine whether Dr. Boston's Study provides a strong basis in evidence to justify a racial preference program, the Court must examine both the data utilized by Dr. Boston and the methodology employed by him in analyzing the data. The evidence introduced at trial reveals serious flaws in both the data and the methodology employed by Dr. Boston.

First, following *Croson*, Fulton County is justified in adopting a program of racial preferences if it can show a strong statistical disparity between the availability of minority firms and their utilization by Fulton County. The two crucial numbers then are availability and utilization. Dr. Boston's availability numbers are set forth in Table 19(a) as follows:

Blacks	28.60%
White Females	3.55%
Hispanics	1.22%
Asians	1.83%
Native Americans	0.25%
Percent of all available firms	35.45%

No explanation is given in the Study itself as to the source of these numbers or any indication of their accuracy or reliability. Given the critical importance of the availability figures, the absence of any explanation as to their origin is

very troubling. Dr. Boston's utilization numbers are set forth in Table 19(c) as follows:

Average utilization of minorities, 1977-93	18.90%
Average utilization of minorities, 1990-93	19.63%
Average utilization of majority females, 1990-93	1.43%

Dr. Boston explained that he obtained these numbers from examining the uniform contract sign off sheets employed by Fulton County for all contracts. He also explained the differences between his numbers and the numbers reported to the Board that included only contracts exceeding $20,000. (Def. Exh. 21, Table 2). Using these numbers. Dr. Boston obtains the following disparity ratios:

Minorities, 1977-93	59.25%
Minorities, 1990-93	61.54%
Majority females, 1990-93	40.28%

Using these disparity ratios, Dr. Boston arrived at five year goals of 33% for minorities and 10% for females. His explanation for his methodology in reaching this overall goal of 43% was as follows:

> The goals in Table 19(d) have been derived through the use of a proprietary methodology developed by Dr. Boston. This method has also been used to derive goals for the City of Atlanta and The Atlanta School System. It takes into consideration the disparity that firms have/are encountering, their availability in the market place and the awards they would have received but for discrimination. The recommended goal for minorities is 29% starting in 1995 and increasing by one percentage point over the next five

> years to 33% (see Tables 19 d & e). The recommended goal for females is 6% starting in 1995 and increasing by one percentage point each year for the next five years to 10%.

(Def. Exh. 21 at 37-38). On June 15, 1994, Dr. Boston presented his Study to the Fulton County Board of Commissioners. The Board voted to adopt the Study without any discussion of the validity of his data or his analysis. The 1994 MFBE Program contains the minority and female preference goals recommended by Dr. Boston for 1995.

At trial, Dr. Boston testified as to the source of his availability data. He testified that the data was derived in part from a study that he did that was incorporated in an Addendum to the Brimmer-Marshall Study. (Def. Exh. 14). No evidence was offered that this study was ever presented to or considered by Fulton County in adopting its MFBE Program. Therefore, the Court admitted the study only for the limited purpose of serving as a foundation to Dr. Boston's expert testimony. Based upon his analysis of the number of companies submitting bids to the City of Atlanta from 1978 to 1989, Dr. Boston determined that total MFBE availability was 28.30%. At trial, he testified that he did another study of availability for the Atlanta School System and found total MFBE availability of 42.60%. He averaged those two figures to get the total 35% MFBE availability that is contained in Table 19(a) of the Post-Disparity Study.

The Court finds that Dr. Boston's 35% MFBE availability number is unreliable for numerous reasons. It is based upon the assumption that there is at least a close approximation between the availability of MFBEs to the City of Atlanta and the Atlanta School System and the availability of such firms

to Fulton County. Based on the evidence at trial, the Court is not willing to make that assumption. Only 50% of the minority firms certified by the City of Atlanta were also certified by Fulton County. The geographical bounds and the populations of Atlanta and Fulton County are different. Although there is a geographic overlap of roughly 50% between the City and Fulton County, the part of the County that lies outside the city limits has a substantially different racial composition than the City. The undisputed evidence showed that roughly 90% of all African-American businesses in Fulton County lie inside the City of Atlanta. The businesses located in areas of north Fulton County range between 81% and 100% white. Common sense suggests that the percentage of African-American businesses available to Fulton County is likely lower than the percentage available to the City of Atlanta or the Atlanta School System.

Another problem arises when Dr. Boston's availability, as measured by bidders, is compared with utilization, as measured by contract dollars, to produce a disparity ratio. The cross examination of Dr. Boston persuades the Court that counting bidders greatly overstates the true availability of minority firms to the City of Atlanta during the period of the Study because it does not take into account the actual relative unavailability of minority firms to bid on and obtain large construction contracts. Furthermore, the services provided by Fulton County are very different from those provided by the Atlanta School System. For all of these reasons, the Court concludes that the availability numbers contained in the Post-Disparity Study are not reliable.

Furthermore, more reliable data is available to indicate that Dr. Boston has vastly overstated the availability of minority firms in the Atlanta metropolitan area. Dr. Marshall has

described the Census Bureau's 1987 and 1992 SMOBE and the 1990 decennial census microdata as "the most recent and comprehensive data available that allow direct comparisons between minority and non-minority male-owned businesses and business owners." (Def. Exh. 235 at 21). Dr. Marshall testified at trial that "these are numbers that are produced by official government services and are very reliable and if they are not reliable, they give you information to tell you why they are not." Dr. Wainwright at trial described the SMOBE data as "one of the finest sources available." This data indicates availability in the Atlanta SMSA of all African-American firms of 7.4% in 1987 and 9.9% in 1992. (Def. Exh. 235, Exh. A, Tables D and E). This compares with Dr. Boston's availability figure of 28.60% for African American firms. (Def. Exh. 21, Table 19(a)). The reasons given by Dr. Boston for not using census data are not persuasive. This is the same data that Dr. Marshall and Dr. Wainwright relied upon in the Brimmer-Marshall Study and their later reports. If anything, the census data overstates minority availability because publicly-owned corporations are not included. For all of these reasons, the Court declines to accept Dr. Boston's measure of the availability of MFBE firms to Fulton County. With flawed availability data, Dr. Boston's disparity ratios collapse as well.

Even if the disparity ratios were valid, the Court rejects Dr. Boston's methodology for using them to arrive at goals for minority participation. Dr. Boston's goals are derived through a methodology developed by him in connection with a similar project to derive minority and female goals for the City of Atlanta. (Def. Exh. 14). Dr. Boston's goal methodology is set forth in a letter to Rodney Strong, Director of the City of Atlanta's Office of Contract Compliance. (*Id.*). Dr. Boston's methodology is rather

complex. Dr. Boston examined City of Atlanta contract data that spanned a ten-year period to determine the average availability and utilization of African-Americans, females, Hispanics, Asians, and Native-Americans in the City of Atlanta. Thus, the ten-year average UPI was calculated to be .56 for African-Americans, .08 for females, .017 for Hispanics, .122 for Asians, and .017 for Native-Americans. Dr. Boston then calculated the ten-year average disparity, which is formulated as (1-UPI). Thus, using African-Americans as the primary example, the ten-year average disparity was reported as .44.

In the next part of Dr. Boston's methodology, he sets forth a method to determine the average percentage of the disparity due to discrimination. To make this determination, Dr. Boston lists ten adjustment or discriminatory factors that might cause a disparity in minority contracting in the City of Atlanta: (1) anecdotal evidence of discrimination; (2) historical/descriptive documentation of discrimination; (3) contract disparity before the MFBE program; (4) exclusion from trade organizations; (5) discrimination in local income and employment; (6) exclusion from private sector; (7) discrimination in lending; (8) discrimination in bonding; (9) market UPI; and (10) public testimony. He weighted each of these factors equally at 10% each. He then assigned each of these factors a number between 1.00 and 0, representing in effect a percentage between 0% and 100%. Dr. Boston then added up the ten percentages. If the total percent equaled 100, then Boston concluded that the disparity was caused entirely by discrimination. Dr. Boston testified that he, along with Rodney Strong and one other, assigned each adjustment factor. After making each assignment, Dr. Boston determined the average percentage of disparity due to discrimination to be 73% for African-Americans, 6% for

women, 12% for Hispanics, 10% for Asians and 4% for Native-Americans.

Dr. Boston then multiplied the ten-year average disparity by the average percentage of disparity due to discrimination to reach a ten-year average disparity due to discrimination. For African-Americans, this number was .32. The ten-year average disparity due to discrimination was added to the ten-year average UPI to arrive at the ten-year average UPI but for discrimination. Dr. Boston determined this number to be .88 regarding African-Americans. Dr. Boston then multiplied .88 by the ten year average availability percentage to calculate the ten-year utilization but for discrimination, which was .23. Dr. Boston subtracted the ten-year average utilization percentage from .23 to arrive at the ten-year average underutilization due to discrimination. Finally, Dr. Boston added the ten-year utilization but for discrimination (.23) to the ten-year average underutilization due to discrimination to arrive at the final recommended goal for the City of Atlanta of 31% for African-Americans. In contrast to the City of Atlanta Study, the 1994-Post-Disparity Study does not detail this methodology in computing Fulton County's MFBE goals for the years 1994-1999.

The Court finds Dr. Boston's methodology for determining the degree of disparity due to discrimination to be an unacceptable basis for making this determination. The accepted method of controlling for independent variables is a statistical regression analysis. Instead of that, Dr. Boston utilized this novel method of listing ten ways of proving discrimination, weighing them equally according to the subjective assessment of three individuals and then using the average as the amount of disparity due to discrimination. No explanation is given for the enormous differences that are

produced, for example, between African-Americans and Hispanics. The Court is not persuaded that this methodology produces any reliable information.

Although Dr. Boston followed the same methodology in the Fulton County study as in the City of Atlanta study, he did not give the same amount of detail. For overall minority amounts, he transferred the African-American result of 73% from the City of Atlanta study and applied it to all minorities, even though the City of Atlanta Study concluded that minorities other than African-Americans had much lower disparities due to discrimination than African-Americans. The subjective nature of the analysis is illustrated by the fact that Dr. Boston changed the adjustment factor for females based upon a "conversation" with Mr. Cooper about the public hearing on discrimination against females in the marketplace. The goal of 35% MFBE participation is based on a subjective process rather than sound statistical methods. Moreover, Dr. Boston's recommendation to increase the MBE participation by 1% a year without a sound statistical foundation further illustrates the arbitrariness and unreliability of Dr. Boston's methodology. In conclusion, the goal setting methodology referenced in the 1994 MFBE Program is arbitrary and completely unreliable.

The third basic flaw is that Dr. Boston did not use scientific methods to account for disparities for reasons other than discrimination. In connection with his post-disparity study, Dr. Boston never conducted a regression analysis to see whether the underutilization of MFBEs was due to discrimination or was due primarily to other neutral factors such as firm size, inability to obtain bonding, or inability to obtain financing. The Court has before it no sound statistical method to show that the disparity in the years 1990-1993

were due either to discrimination or neutral factors. It is worth noting that Dr. Boston's study only calculates utilization figures for MBEs as a group and does not calculate separate utilization figures for African-Americans, Asians, Hispanics, and Native-Americans. Finally, in arriving at the utilization results based on the amount of dollars awarded, Dr. Boston relied on Fulton County records. These records show that in contract awards under $40,000, MBEs received an average of 35% in the years 1990, 1991, and 1993. When you factor in 1992, the average utilization falls to 32%. In contracts between $40,000 and $100,000, the average utilization of MBEs for the years 1990-1993 is approximately 29%. In contracts between $100,000 and $1 million, the average utilization of MBEs for the years 1990-1993 is 39%. Overall, MBE utilization on contracts less than $1 million, based on dollars awarded, is approximately 33%. In contracts over $1 million, the average utilization of MBEs for the years 1990-1993 dips to under 17%. Thus, when you factor in the high dollar contract awards going to majority firms, the overall utilization of MBEs based on the dollar of contract awards would naturally decrease. The evidence suggests, however, that there are simply few minority bidders for the largest contracts due to the smaller average size of minority firms. A review of the evidence regarding bids on City of Atlanta contracts reveals that as the size of the contract awards increase to $20 million or more, the amount of MBEs even placing bids dips dramatically in comparison to majority firm bids. Even if there was a differential between the percent of minority firms bidding for these huge construction contracts and utilization of them, Fulton County would bear the burden of proving that the difference was due to its own discrimination, rather than other factors. Dr. Boston has performed no regression analysis to show that the disparities were either due to discrimination or other neutral grounds.

The evidence supports an inference that MBEs are not available to perform these contracts for reasons other than active or passive discrimination by the City of Atlanta or Fulton County. In the Brimmer-Marshall Study, a sample of construction firms in the Atlanta area indicated that 19% of the majority-owned firms had unlimited bonding capacity, while 0% of minority owned firms had unlimited capacity. (Def. Exh. 146, Part III at 237). In his report in the Brimmer-Marshall Study, Dr. Boston concluded that "[t]he greatest problems among MFBEs [seeking construction contracts] appear to be a low success rate at securing bonding and the inability to secure large or unlimited bonding capacity." (*Id.* at 138). Overall, the Court finds and concludes that the methodology and statistics outlined in the 1994 Post-Disparity Study fail to provide a strong basis in evidence of discrimination against MBEs to justify Fulton County's race and ethnic preference program. Given the flaws identified in his methodology, Dr. Boston's study fails to show "gross statistical disparities" between the proportion of MBEs hired for projects or contracts, and the proportion of minorities willing and able to do the work. *See Engineering Contractors*, 122 F.3d at 908.

The Court also finds that the 1994 Post-Disparity Study fails to demonstrate probative evidence sufficient to justify the 6% female participation goal. Dr. Boston's Post-Disparity Study fails to document proper utilization figures for Fulton County firms owned by females. In calculating utilization, most minority females are aggregated in the general minority category with some minority females added in the category of "Female NEC." (Def. Exh. 21 at Table 1). Thus, the utilization of FBEs appears to be entirely speculative. In taking availability data from the City of Atlanta and the Atlanta School System, Dr. Boston calculated an adjusted

availability of 3.55%. To calculate participation goals for FBEs, Dr. Boston applies his fatally-flawed goal setting methodology. It is unclear from a document entitled "Fulton's UPI Calculation" whether Dr. Boston used the adjustment factors calculated with respect to determining disparity due to racial discrimination to the FBE goal calculation. (Def. Exh. 2). Nevertheless, the Court finds that the 6% FBE goal was arbitrarily reached based on the statistical methodology employed by Dr. Boston. In short, the 1994 Post-Disparity Study fails to provide sufficient probative evidence of gender discrimination to justify the preference goals of 6% for FBEs.

c. The 1994-1997 Statistical Evidence

Both the Plaintiff and the Defendants have submitted statistical studies of data collected for the years 1994-1997. At the outset, the Court notes that the statistical conclusions reached in these studies are potentially skewed by the presence and active implementation of the 1994 MFBE Program. Some of the numbers are more likely to be affected by the operation of the program than others. For example, the number of contracts awarded is most likely to be affected by the Program; the number of bids submitted less so. Accordingly, the Court accords these studies less weight than it would give to studies performed closely before the program became effective. Nevertheless, these studies lend more credence to the Court's conclusion that the Defendants have failed to demonstrate a strong basis in evidence justifying Fulton County's race and ethnic preference program.

The Plaintiff has submitted into evidence a study conducted by their expert, Dr. George Easton. (Pl. Exh. 208). Dr. Easton teaches statistics at the Emory Business School. In his

Report, he found that MFBE had an average availability percentage of around 16% (9% African-American and 7% other minorities) for MBEs in the years 1994-1997. His figures were based on SMOBE census data. A special tabulation of the data by the Census Bureau showed 14.6% of small firms (*i.e.*, proprietorships, partnerships and non-publicly held corporations) in the Atlanta SMSA were minority owned.[5] He assumed that minority and non-minority firms were equally willing and qualified to bid on Fulton County contracts. His analysis indicates that nonminorities are receiving from 11% to 17% less in Fulton County contract dollars than they should receive based upon their availability. Minorities are receiving an amount more than they should be receiving based upon availability. Dr. Eason's data results in disparity ratios of greater than 1.0 for minorities for each year in the period 1994-1997. The disparity ratios for majority firms exceed .80 for each year in question. Therefore, his data shows no discrimination against minorities and possible discrimination against nonminorities. Although the Defendants have identified potential flaws in his statistical significance calculations, the study supports the finding that no strong basis in evidence exists to justify Fulton County's race and ethnic program. If anything, Dr. Easton's data overstates the availability of minorities because the numbers exclude all corporations except Chapter S Corporations (those with 35 or fewer owners). Certainly, Dr. Easton's study is inconsistent with any gross statistical

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[5] Dr. Easton, Dr. Marshall and Dr. Wainright all agree that the appropriate marketplace to study availability is the Atlanta SMSA. Dr. Wainwright also agrees with Dr. Easton that the SMOBE data provides reliable estimates for the number of minority-owned firms in the Atlanta SMSA.

disparities in the availability and utilization of minorities by Fulton County.

Fulton County responded to Dr. Easton's study by producing the testimony contained in Dr. Boston's Amended Rebuttal Report. (Def. Exh. 17). Dr. Boston has performed a number of statistical studies with regard to the data collected for the years 1994-1997. In his Amendment to the Rebuttal Report, Dr. Boston performed a study in which he concluded that between 1994 and 1997 there was neither statistically significant underutilization of non-MFBEs nor overutilization of MFBEs in Fulton County's contracting activities. (Def. Exh. 19). At the bench trial, Dr. Boston stated that the statistical analysis in this report updated a previous report and was particularly reliable. Dr. Boston relied on the following Fulton County data in performing his statistical analysis: (1) the Board's Post-Agenda/Preliminary minutes; (2) Fulton County Purchasing Department Bid Tabulation Sheets for 1997; and (3) Request for Approval of Lowest Responsible Bidder data.

In computing MFBE and non-MFBE availability for the years 1994-1997, Dr. Boston relies on the number of bids submitted as opposed to the number of bidders. With regard to the award of contracts less than $20,000, he reported MFBE availability of 25.1% in 1994, 29.9% in 1995, 25.8% in 1996, and 23.1% in 1997. The average of these availability figures is 25.9%. The report further reflects utilization percentages of 26.8% in 1994, 32.1% in 1995, 37.2% in 1996, and 34.6% in 1997. Significantly, these figures produce disparity ratios of 1.06, 1.07, 1.44, and 1.49. Dr. Boston then performed standard deviation analysis based on the utilization and availability percentages. This analysis describes the probability that the measured disparity is the

result of chance. The Eleventh Circuit has stated that scientists consider a finding of two standard deviations to be significant, which means that "there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1556 n. 16 (11th Cir. 1994). According to Dr. Boston, the standard deviation calculations for each year indicate that non-MFBEs were not underutilized and MFBEs were not overutilized. Dr. Boston also conducted an analysis of contract awards over $20,000, but the Court can discern no availability figures for MFBEs and non-MFBEs.

The Court finds that Dr. Boston's rebuttal study fails to provide a strong basis in evidence for the 1994 MFBE Program. It also fails to provide sufficient probative evidence to justify the gender preferences contained in the program. The study reports an average availability based on a liberal bid analysis of 25.9%. The study shows that from 1994-1997, MFBEs were overutilized to some extent, if not a statistically significant extent. The disparity ratios are all much greater than the .80 recognized as indicating significant disparity. *Engineering Contractors*, 122 F.3d at 914. The Court fails to see how such a finding could support a finding of discrimination against MFBEs sufficient to justify a 35% preference program for MFBEs. The County has also failed to submit any credible statistical analysis showing a gross disparity between the availability of minority and female firms and their utilization by Fulton County.

2. Anecdotal Evidence

The Court now turns to examine the anecdotal evidence presented by the Defendants to justify the 1994 MFBE

Program. Fulton County has introduced a substantial amount of anecdotal evidence in connection with the Brimmer-Marshall Study and the 1994 Post-Disparity Study. As discussed above, anecdotal evidence may be used to establish discrimination, especially if buttressed by relevant statistical evidence. *Engineering Contractors*, 122 F.3d at 907. The Eleventh Circuit stated that:

> Anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone. While such evidence can doubtless show the perception and, on occasion, the existence of discrimination, it needs statistical underpinnings or comparable proof to show that substantial amounts of business were actually lost to minority or female contractors as the result of the discrimination.

Id. at 925-26. As Dr. Marshall acknowledged at trial, the problem with anecdotal evidence is that it is subject to "all kinds of biases." That is why it needs, in the words of the Eleventh Circuit, statistical underpinnings.

In Part II of the Brimmer-Marshall Study, the authors presented anecdotal evidence through confidential in-depth interviews of 76 individuals regarding the ongoing effects of past and present race and gender discrimination. (Def. Exh. 146, Brimmer-Marshall Study, Part II). The individuals interviewed included trade association representatives, MBE representatives, civic organization representatives, and public administrators who played some role in the development and implementation of MFBE programs. The interviewers painted a bleak picture of discriminatory practices in the Atlanta area, especially with regard to private sector discrimination. The interviewees reported difficulties and

unfavorable experiences of racial, ethnic and gender discrimination in several areas, including (1) discrimination in bonding; (2) discrimination in financing; (3) discrimination in employment opportunities; (4) double standards in performance and qualifications; (5) limited access to private sector markets; and (6) stereotypical attitudes on the part of customers and buyers.

Further, Fulton County conducted open public hearings in 1992 in connection with the Board's acceptance of the findings in the Brimmer-Marshall Study. At those hearings, numerous individuals provided further anecdotal evidence regarding their experiences in the Fulton County contracting and procurement activities and practices in the Atlanta/Fulton County marketplace. (Statement of Michael Cooper at 3). The individuals included construction contractors, MFBE owners, laborers, professionals, representatives from the City of Atlanta, and representatives of government agencies. The Court has reviewed the tapes of the hearing. Only two individuals testified to having experienced discrimination by Fulton County. One of these was a Native-American designer who complained bitterly that Fulton County uses the MFBE Program to benefit only African-Americans. The most common complaints were about bonding, insurance and other contract requirements that made it difficult for small or newer businesses to compete; the failure of County officials to return phone calls and other communication problems; the lack of capital and inability to obtain financing; slow payments by prime contractors; and minority and female businesses used as fronts for majority contractors. One minority contractor recognized that the desire of existing businesses to keep established clients is not in itself discrimination. The last witness, speaking on behalf of the National Association for Minority Contractors, testified that

the MFBE Program should be used to transfer wealth to the black community. The anecdotal evidence presented at the public hearings is insufficient to support racial and ethnic preferences subject to strict scrutiny.

In the 1994 Post-Disparity Study, Dr. Boston conducted a random survey of 183 minority and female firms certified by Fulton County. (Def. Exh. 21 at 33). The number of total responses to the survey was 73. The distribution of respondents to the survey is as follows: (1) 72.7% African-American; (2) 16.7% majority female; (3) 4.2% Asian; (4) 1.4% Hispanic; and (5) 4.2% Native-American. In his survey, Dr. Boston found that 16% of those responding agreed or strongly agreed that they have encountered discrimination at Fulton County in the past. (*Id.* at 34, Table 14). Approximately 12% agreed or strongly agreed that they are still encountering discrimination at Fulton County. The survey also found that (1) 52% agreed or strongly agreed that they have encountered discrimination in pursuing financing and credit in the last five years; (2) 20% agreed or strongly agreed that they have encountered bonding discrimination in the last five years; and (3) 53% agreed or strongly disagreed that they have encountered discrimination by majority-owned firms in the last five years. Overall, MBEs report that they still feel discriminated against, especially by majority firms. Dr. Boston also reports that there is a feeling that the MFBE programs are skewed to assist African-American vendors. (*Id.* at 35, Table 16).

The anecdotal evidence reflects the honest and concerned beliefs of many in the Atlanta and Fulton County area that they have been or are the victims of discriminatory practices. However, the anecdotal evidence alone is insufficient to provide the strong basis in evidence to justify the racial and

ethnic preferences or sufficient probative evidence to justify the gender preferences of the 1994 MFBE Program. It is insufficient to offset the weaknesses of Fulton County's statistical evidence. The Court notes that much of the anecdotal evidence offered supports the identification of discrimination in the private sector and not by Fulton County. This is clearly not the exceptional case where anecdotal evidence standing alone may justify a race, ethnic or gender preference program.

D. NARROW TAILORING AND SUBSTANTIAL RELATIONSHIP

As the Eleventh Circuit did in *Engineering Contractors*, the Court will proceed with the narrow tailoring analysis notwithstanding the finding that the 1994 MFBE program does not rest on an adequate evidentiary foundation. The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a "last resort." *Engineering Contractors*, 122 F.3d at 926. The Eleventh Circuit has identified four factors that should be taken into account: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant market; and (4) the impact of the relief on the rights of innocent third parties. *Id.* at 927 (*citing Ensley Branch*, 31 F.3d at 1569).

Fulton County's 1994 MFBE Program fails this test on several grounds. First, it is not the law in the Eleventh Circuit that the existence of a race-based problem necessitates a race-based remedy. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy

can never be narrowly tailored to that problem." *Engineering Contractors*, 122 F.3d at 927. There is no evidence that the Fulton County government has itself discriminated against minorities or females in the decades of the 1980s and 1990s. It has had available to it the race-neutral remedies identified by the Supreme Court in *Croson*, 488 U.S. at 509-10, 109 S. Ct. at 730-31, and by the Eleventh Circuit in *Engineering Contractors*, 122 F.3d at 928. During this period, a majority of the Commissioners on the Board have been African-American. However, Fulton County has been operating a racial and ethnic preference program for most of the last two decades. The program is now defended entirely on the basis of discrimination in the private sector. While it has paid lip service since *Croson*, the Court is not persuaded that it has seriously considered race-neutral remedies. There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set asides based upon race and ethnicity. Dr. Marshall and Dr. Boston both testified that they were not asked to study the efficacy of race-neutral measures. Dr. Marshall's argument at trial that race neutral measures are more expensive than preferences is entitled to no weight in light of *Croson*. It is instructive to return to *Croson* where Justice O'Connor stated:

> Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to

> perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.

Croson, 488 U.S. at 509, 109 S. Ct. at 730 (citations omitted). There is no evidence that Fulton County has made any attempt to identify majority contractors, lenders, bonding companies, or others who discriminate against minority business enterprises. Thus, those who are disfavored by the program are not those who have engaged in discrimination. Similarly, those who are favored by the program are not necessarily those who have suffered from discrimination.

The "random inclusion" of ethnic or racial groups who may never have suffered from discrimination further suggests that Fulton County's remedy for discrimination is not narrowly tailored to a remedial purpose. *Croson*, 488 U.S. at 506, 109 S. Ct. at 728. It appears that participation goals for Hispanics, Asians and Native-Americans were added to the program solely to boost the overall minority participation percentage. There is no evidence that Fulton County considered alternatives to ethnic preferences with respect to minorities other than African-Americans. As in *Engineering Contractors*, "[i]t is clear as window glass that the County gave not the slightest consideration to any alternative to a Hispanic affirmative action program. Awarding construction contracts based upon ethnicity is what the County wanted to do, and all it considered doing, insofar as Hispanics were concerned." *Engineering Contractors*, 122 F.3d at 928. There is no evidence that race neutral measures were initiated

on a trial basis and failed. *See Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983, 111 S. Ct. 516, 112 L. Ed. 2d 528 (1990). Fulton County offered no evidence to refute the testimony of former Chairman Skandalakis that no consideration was ever given to substituting a program of race neutral measures as an alternative to numerical set asides based upon race and ethnicity. Accordingly, the Court has no alternative but to accept that testimony as credible and worthy of belief. Mr. Skandalakis further testified that he voted in favor of the 1994 MFBE program to advance his own political agenda by accommodating the African-American majority on the Board rather than to remedy the effects of past discrimination. This is the sort of "racial politics" condemned by Justice O'Connor in *Croson*. The racial and ethnic preferences adopted in the 1994 MFBE program were not adopted as a "last resort" and fail the "narrow tailoring" test for this reason.

Second, for all of the reasons set forth above, there is no substantial relationship between the numerical goals and the relevant market. There is no credible evidence that minorities and women accounted for 35% of the business enterprises ready and willing to bid on and perform contracts for Fulton County in 1994 or in any subsequent year. Dr. Boston testified that the 35% goal that he recommended was arrived at only by adding to current availability some conjectural percentage to compensate minorities for past discrimination. Dr. Marshall testified that minority participation goals must be set higher than current availability in order to compensate minorities for past discrimination and lack of opportunity in the private sector. This may be good public policy. However, it is inconsistent with Justice O'Connor's analysis

in *Croson* as followed by the Eleventh Circuit in *Engineering Contractors*.

With respect to the narrow tailoring analysis, the County contends that the program should be upheld because it sets "goals" rather than mandatory quotas and that it has liberal waiver provisions. The Fulton County 1994 MFBE program is in all significant respects identical to the Dade County program struck down in *Engineering Contractors*. The Dade County program also utilized participation "goals" and had a waiver provision. In this regard, the Court accepts as credible the testimony of Thomas Bruns that various contracting procedures were employed by Fulton County department heads, buyers and the Office of Contract Compliance to award contracts to minorities in order to achieve the numerical percentages established by the program. The Court accepts this testimony as credible because it is corroborated by the documentary evidence from the bid files. The procedures used to achieve the participation goals included disqualifying majority firm bidders for failing to comply with the program (Pl. Exh. 3-25), awarding contracts to higher bidders in order to obtain minority participation (Pl. Exh. 35, 37), splitting bids so that minority firms received part of a contract when a majority firm was the overall low bidder (Pl. Exh. 49-54), solicitation of minority firms after bids were closed (Pl. Exh. 56, 57), rebidding contracts in order to obtain minority participation (Pl. Exh. 58), treatment of the participation goals as mandatory requirements (Pl. Exh. 64-66, 70, 71, 116), awarding "points" for minority participation in evaluation criteria (Pl. Exh. 73-77), and awarding an entire contract to minority vendor overall low bidders rather than splitting the contract to give part to majority firms low bidding on some items (Pl. Exh. 78-84). The rebuttal testimony of Mr. Cooper offered by the County as to these

examples of the practices identified by Mr. Bruns either fails to address the exhibits relied upon by the Court or is contradicted by the documents. It is undisputed that compliance with the 1994 MFBE Program was a factor in determining whether a bid was considered a "responsible" bid. Yes, the Program is flexible where no minority contractors are available. However, it is also clear that the Program as implemented classified firms according to race and ethnicity and preferred certain races and ethnic groups over others.

In response to Bruns' testimony, the Defendant presented the testimony of Commissioners Hightower, Darnell and Boxill. They each testified that it is not the policy of Fulton County to award contracts on the basis of race, ethnicity or gender; that it is not the policy of Fulton County to threaten vendors with rejection of bids if they do not comply with the MFBE Program; that it is not the policy of Fulton County to require the mandatory satisfaction of any specific percentage participation by MFBEs in County contracting; that it is not the policy of Fulton County to reject bids by majority contractors if they fail to comply with the MFBE Program; that it is not the policy of Fulton County to steer professional services contracts to minorities; and that it is not the policy of Fulton County to employ the practices identified by Mr. Bruns to ensure that minority firms receive Fulton County contracts. Similar testimony was given by the former head of Contract Compliance and the current and former Purchasing Directors. Accepting their testimony as being true, the high levels of minority and female participation in Fulton County contracting have been achieved without a policy of discriminating on the basis of race or gender. Therefore, there is no need to maintain as official County policy a MFBE Program that authorizes discrimination by race,

ethnicity and gender. Furthermore, if the Court accepts their testimony as true, there is no reason to believe that abolishing the official policy of race and gender preferences will result in fewer contracting opportunities for women and minorities.

Finally, the Program does have a sunset provision providing for expiration of the Program in September, 1999. However, the Sunset provision also provides:

> This Program may be extended for an additional five (5) year period, if the Board of Commissioners after review and consideration of all annual and other reports, other relevant information and public hearing testimony, finds that there is a continuing need for the Policy because its purposes and objectives have not been achieved.

(Pl. Exh. 1 at 55). No evidence was offered of any intention on the part of Fulton County to allow the 1994 MFBE Program to expire. The legality of the Program was vigorously defended at trial. The Court infers from this that the County believes there is a continuing need for the Program and that it will be continued unless enjoined by this Court. For each of these reasons, the Court finds that the County has not met its burden of showing that the race and ethnic preferences of the 1994 MFBE Program are narrowly tailored to achieve a compelling governmental interest.

If the gender preferences of the Fulton County MFBE Program should be analyzed by the narrow tailoring analysis applied to the racial preferences, the gender preferences would fall for the same reasons. However, the standard the Eleventh Circuit has established for considering gender preferences is much different than that for racial preferences.

Again, the Court must follow the analysis set forth in *Engineering Contractors*:

> When a gender-conscious affirmative action program rests on a sufficient evidentiary foundation, the government is not required to implement the program only as a last resort. Under intermediate scrutiny, the government may implement a gender preference so long as it can show that the program is substantially related to an important government interest . . . . Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.

Engineering Contractors, 122 F.3d at 929. The County's gender preference program was not adopted as a last resort. However, it is sufficiently flexible to satisfy the intermediate standard of a substantial relationship to the County's stated rationale. However, because of the County's failure to present sufficient probative evidence of discrimination by the County or passive participation by the County in discrimination against women, the gender preferences must fail as well.

III. CONCLUSION

In summary, Fulton County has operated a minority and female preference program for most of the past two decades. The program has been good for economic development in the minority business community. Historically, minorities have been the victims of pervasive discrimination in all facets of economic enterprise. As a matter of good public policy, this alone might justify minority set aside programs by public agencies. Nonetheless, the Supreme Court has held that such

programs involving racial or ethnic preferences must be subjected to strict scrutiny. Applying the high standards set by the Supreme Court and the Eleventh Circuit, the Fulton County 1994 MFBE Program cannot survive strict scrutiny with respect to the evidentiary foundation for such a program or its narrow tailoring to meet a compelling governmental interest. There is no evidence that the Fulton County Government has significantly or systematically discriminated against African-American or other minority businesses in the decades of the 1980s and 1990s. There is insufficient evidence that it has become a passive participant in a pervasive system of discrimination in the private sector and that racial and ethnic preferences have been adopted as a last resort to eliminate that discrimination. The program itself does nothing to remedy discrimination in private sector contracting. The goals set by the program are not based upon any realistic assessment of the availability of minority business enterprises in the Atlanta metropolitan marketplace. Likewise, Fulton County has not produced sufficient probative evidence of discrimination against female business enterprises to justify a gender preference program. Therefore, race, ethnic and gender balancing in Fulton County contracting must end.

For the reasons set forth above, the Court sitting as the trier of fact finds in favor of the Plaintiff Webster Green Thumb as to its claim that the Fulton County 1994 Minority and Female Business Enterprise Program is unconstitutional. Therefore, Defendant Fulton County is hereby permanently enjoined from using racial, ethnic or gender participation goals in accepting or rejecting bids, determining whether bidders are responsive and responsible bidders and in the awarding of Fulton County contracts. There being no reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil

Procedure, the Clerk is directed to enter a Final Judgment consistent with this Order as to the claim for declaratory and equitable relief of Plaintiff Webster Green Thumb Company. Counsel are directed to contact the Court's Courtroom Deputy Clerk to schedule a status conference regarding the trial of the Plaintiff's damage claims and any other proceedings to be had in this matter.

Appendix C

United States District Court,
N.D. Georgia,
Atlanta Division.

Daniel WEBSTER, et al., Plaintiffs,
v.
FULTON COUNTY, GEORGIA, et al., Defendants.

No. Civ.A. 1:96CV2399TWT.

Feb. 12, 1999.

ORDER

THRASH, District Judge.

This is a complex race and sex discrimination case brought pursuant to 42 U.S.C. §§ 1981, 1983, and the Equal Protection Clause. It is before the Court on the (1) Plaintiffs' Motion for Summary Judgment [Doc. No. 103]; (2) Defendants' Motion for Summary Judgment [Doc. No. 105]; and (3) Defendants' Motion to Strike the Affidavit of Thomas Bruns [Doc. No. 119]. For the reasons set forth below, the Court will (1) deny the Plaintiffs' Motion for Summary Judgment; (2) grant in part and deny in part the Defendants' Motion for Summary Judgment; and (3) deny the Motion to Strike the Bruns Affidavit.

I. BACKGROUND

The Plaintiffs bring this action on behalf of themselves and others similarly situated to redress the alleged deprivation of

rights under 42 U.S.C. § 1981 and the Equal Protection Clause, as enforced by 42 U.S.C. § 1983. The Plaintiffs also assert state claims under the Georgia Constitution and O.C.G.A. § 48-5-220. The named Plaintiffs are Daniel Webster (white male), Peggy Webster (white female), Kelly Goff (white male) and The Webster Green Thumb Company ("Green Thumb"). The Defendants consist of (1) Fulton County; (2) individual members of the Fulton County Board of Commissioners ("Board"); and (3) Michael Cooper, Director of the Department of Contract Compliance and Equal Employment Opportunity ("Department") for Fulton County. Plaintiffs claim that the Defendants discriminated against them because of their race and gender. Their principal claim is that Fulton County operates an illegal Minority and Female Business Enterprise program that favors minorities and females in the award of contracts for goods and services.

Fulton County adopted its first minority business enterprise program in 1979. (Doc. No. 103, Exh. B). The Board at that time resolved to begin an affirmative action program with a goal that at least 20% of all County public contracts be awarded to minority bidders. (*Id.*). The Board passed resolutions continuing the program in 1984 and 1987. The 1987 resolution established the Office of Contract Compliance and Equal Employment Opportunity. In 1988, Defendant Cooper was hired as its first Director. In 1989, the Board commissioned Dr. Andrew F. Brimmer and Dr. Ray Marshall to conduct a fact-finding study relating to the participation of minorities and females in the Fulton County marketplace. Dr. Brimmer and Dr. Marshall also studied whether discrimination against minority-owned and female-owned business enterprises ("MFBE's") has reduced their participation in the public and private sector contracting and

procurement activities in the Atlanta and Fulton County marketplace. (Doc. No. 105, Second Cooper Aff. ¶ 3). In 1990, Dr. Brimmer and Dr. Marshall produced and submitted to the County and City of Atlanta the Brimmer-Marshall Study which consisted of eight volumes entitled: "Public Policy of Minority Economic Development." Dr. Thomas Boston, an economics professor, prepared a report for the Brimmer-Marshall Study entitled "Discrimination and Economic Development: Effects on Minority and Female Business Enterprises." (Doc. No. 105, Boston Aff., Exh. B). According to Dr. Brimmer and Dr. Marshall, the Boston report (contained in Part III of the Study) shows that MFBE's have experienced inequitable treatment and discrimination in obtaining contracts in Fulton County and the City of Atlanta in both the public and private sectors.

In 1992, the Board passed resolutions accepting the findings of the Brimmer-Marshall Study. In 1992, Fulton County conducted open public hearings in which numerous individuals provided further anecdotal evidence regarding their experiences in the Fulton County contracting and procurement activities and practices in the Atlanta/Fulton County marketplace. On October 21, 1992, the Board authorized the implementation of a MFBE Program under the auspices of Defendant Cooper as the Director of the Department. (Doc. No. 105, Second Cooper Aff. at ¶ 5, Exhs. A and B). In 1994, the Board engaged Dr. Boston to conduct a post-disparity-study. Dr. Boston submitted this study to the Board in June, 1994. In the post-disparity study, Dr. Boston noted significant improvements since the Brimmer-Marshall Study as reflected by "increased utilization percentages for minority and female vendors, significant improvements in the operation of the Offices of Contract Compliance and the Purchasing Department, and the

centralization of purchasing activities." (Doc. No. 105, Boston Aff., Exh. C). However, the report also noted problem areas such as the low utilization of minority and female vendors on commodity and supply contracts. (*Id.*). As a result, Dr. Boston recommended in the post-disparity study that bid preferences be given to minority and female vendors in connection with commodities and supplies contracts. (*Id.*).

Dr. Boston appeared before the Board and described the benefits of the MFBE program. These included the stimulation of minority and female entrepreneurship, and facilitating the "growth and the diversification, as well as the employment and financial capacity of [MFBE] firms." He stated that MFBE programs of the City of Atlanta, Fulton County and MARTA were "primarily responsible for the fact that now the black-owned businesses in the metropolitan area currently have the highest rate of business formation of any metropolitan area in the country." He summarized his recommendations from the post-disparity study as follows: (1) the MFBE Program remains warranted due to the fact that the present effects of past discrimination have not been remedied; (2) the scope of contract awards reported to the Board should be altered to include a broader range of awards; (3) contract awards should be reported at three levels: above $20,000, below $20,000, and all awards; (4) the format for reporting utilization figures should be completely revised; (5) the uniform contract sign-off sheet should be altered to get detailed information regarding gender and ethnicity; (6) minority and female utilization on commodities, supplies, and contracts under $20,000 should be increased; (7) strong consideration should be given to instituting preferences for local Fulton County firms; and (8) a methodology should be developed for setting MFBE goals that are based on the

availability of minority and female firms and the amount of discrimination. (Doc. No. 105, Second Cooper Aff., Exh. C).

The Board approved and adopted Dr. Boston's post-disparity study on June 15, 1994. The Board then directed that the Department implement amendments to the MFBE Program based on the post-disparity study. On July 20, 1994, the Board passed a resolution adopting certain amendments to the MFBE Program based upon the post-disparity study. Defendant Cooper combined the approved amendments with the existing MFBE Program, resulting in the 1994 Fulton County MFBE Program. (Doc. No. 105, Second Cooper Aff., Exh. G). Thus, the Board established the 1994 MFBE Program to alleviate the effects of past and present discrimination against minority and female business enterprises and to enhance contracting opportunities for those minority and female businesses. (*Id.* at 2). The Board concluded that there were no reasonable race and gender neutral policies available to accomplish these objectives. (*Id.* at 9-10).

The 1994 MFBE Program set forth the following annual business participation goals for the following groups: (1) African-American business enterprises – 26%; (2) Hispanic business enterprises – 1%; (3) Asian-American business enterprises – 1%; (4) Native American business enterprises – 1%; and (5) Female business enterprises – 6%. (*Id.* at 16-17). The MFBE Program provided that these goals were in effect for five years and are subject to an annual review and adjustment by the Department and approval by the Fulton County Manager and Board. (*Id.* at 17). Pursuant to the MFBE Program, the participation goals for minority and female business enterprises are not considered to be fixed quotas. (*Id.* at 19). The participation goals for each project

or contract are set by the Department's Director based on the following non-exclusive list of factors: (1) the number of minority and female business enterprises known to be available for the type and value of service to be obtained; (2) a forecast of all eligible contracts to be awarded within the coming fiscal year, specifying the type and value of goods and services to be obtained; (3) the minority and female business enterprise percentages of the total number of business entities known to be available for the type and value of goods and services to be obtained; (4) the statistical and data sources by which each goal was calculated; and (5) the statistical and data sources from the 1994 post-disparity study. (*Id.* at 18-19).

The MFBE Program further provided that the good faith efforts of a potential contractor to meet minority and female business participation goals shall be considered in deciding contract awards. (*Id.* at 19). These good efforts include, but are not limited to: (1) attendance at pre-bid meetings which are scheduled to inform minority and female business enterprises of prime and subcontracting opportunities; (2) advertisements in general circulation media, trade association publications, and minority and female enterprise media to provide notice of opportunities; (3) written notice to known minority and female business enterprises soliciting their interest in opportunities; (4) efforts made to select portions of work for minority and female businesses subcontracting in areas likely to be successful; (5) efforts to negotiate with minority and female businesses for specific subcontracting; (6) efforts made to assist minority and female businesses to meet bonding, insurance, or other governmental contracting requirements; (7) a statement of reasons why a particular minority or female business enterprise contacted is not qualified for a contract; and

(8) communication with the Department seeking assistance for identifying minority and female business enterprises. (*Id.* at 19-20, 34-35). An Invitation to Bid ("ITB") for a contract over $20,000 contains a short form description of the MFBE Program, including a part where the bidder must demonstrate his good faith efforts by completing a checklist documenting any good faith efforts. (*See* Doc. No. 103, Exh. E).

The MFBE Program provided that it applied "to the totality of Fulton County procurement and contracting, including construction and the acquisition of all commodities, equipment, goods and services (including professional services), however titled and irrespective of the modality or manner procured, and irrespective as to whether purchased or leased." (Doc. No. 105, Second Cooper Aff., Exh. G at 22). Accordingly, the initial categories established by the Board that were encompassed under the MFBE program were listed as (1) construction; (2) commodities; (3) services; and (4) professional services. (*Id.* at 22-23). Fulton County reserved the right to amend these categories upon recommendation by the Fulton County Manager and the Board. (*Id.* at 22).

The 1994 MFBE Program provided that the Department shall evaluate and set appropriate minority or female business participation goals for each specific project or contract. (*Id.* at 25). The Department should consider (1) the nature of the project or contract and the relevant specifications; (2) the availability of minority and female business enterprises in various industry classifications and professions which are ready and able to provide goods and services on the particular project or contract; (3) the level of participation of such firms on past projects or contracts awarded by Fulton County; and (4) other relevant factors. (*Id.* at 26). The MFBE

Program proposed several methods to achieve the minority and female business participation goals as follows:

(1) *Minority and female business enterprise solicitations on procurement purchase orders.* For all purchases, each Fulton County buyer and any other Fulton County employee having the authority to procure is required to contact at least one minority or female business enterprise bidder.

(2) *Joint ventures program.* The department shall encourage, where economically feasible, establishment of joint ventures and mentor protégé programs to insure prime contracting opportunities for minority or female business enterprises on eligible projects. If the prime contractor is a minority or female business enterprise or a joint venture between minority and female firms, subcontracting participation with minority and female business enterprises shall be required on all projects exceeding $10,000,000.

(3) *Mentor/protégé ventures.* The Department encourages mentor/protégé programs to assist individual minority and female business enterprises in financing, bonding, construction management and technical assistance.

(4) *Minority and female business enterprise subcontracting and supplier purchasing goals on construction projects and other contracts.* The Department shall ensure the maximum practicable opportunity for minority and female business participation by requiring that all bidders on a designated project or contract comply with certain remedial measures.

(5) *Construction Subcontracting.* The department may impose a requirement that bidders wanting to serve as prime contractors on a bid for a Fulton County construction project identified under Program Scope shall subcontract with minority and female business enterprises for a stated percentage of the dollar value of the project.

(6) *Subcontractor participation.* Where a prime contractor utilizes one or more subcontractors to satisfy its minority or female business participation commitment, the prime contractor may count only expenditures to minority and female business enterprise contractors that perform a commercially useful function in the contract work.

(7) *Suppliers participation.* Where a prime contractor utilizes one or more suppliers to satisfy its minority or female business participation commitment, credit will be given toward the applicable goal as follows: (1) 100% of the contract amount for minority and female business suppliers who manufacture the goods supplied; (2) 100% of the contract amount for minority and female business suppliers who are wholesalers warehousing the goods supplied; and (3) where an extraordinarily large portion of the contract price is for equipment or supplies, a lower project goal may be set than otherwise would be required.

(8) *Professional services.* Where Fulton County requires the utilization of professional consultants, the Department shall make knowledgeable and available minority or female business enterprises aware of opportunities to serve as primary consultants on bids.

(*Id.* at 27-33).

The 1994 MFBE Program provided that the Department's Director may grant administrative waivers where reasonable good faith efforts are established, where the situation is deemed to be an emergency, and where deemed appropriate by the Director, the Fulton County Manager and the Board. (*Id.* at 36). A bidder or offeror may seek a partial or total waiver of the project goals. The application for a waiver shall include documentary evidence of the bidder's or offeror's good faith efforts to meet the project goals and why the request should be granted. (*Id.* at 37).

The 1994 MFBE Program provided that all firms participating as either a minority or female business enterprise must be certified before the award of a bid or execution of a contract after review and evaluation as to compliance. (*Id.* at 45). In determining whether a firm is eligible to be certified, any minority or female firm engaged in or attempting to engage in business in the Fulton County Metropolitan Statistical Area before July 20, 1994, is rebuttably presumed to have suffered past racial or gender discrimination and is therefore an eligible minority or female business enterprise. In order to be a certified minority or female business enterprise, the firm or joint venture must comply with certain eligibility standards regarding minority or female control and ownership of the firm or joint venture. (*Id.* at 47-49). The Department reviews whether there is sufficient minority or female operational or managerial control so that the firm can be certified. (*Id.* at 49-51). Finally, the 1994 MFBE program provided that it shall expire five years from its effective date. (*Id.* at 55).

Plaintiffs Daniel and Peggy Webster own and operate Green Thumb, a landscaping and tree removal service. Green Thumb, formerly known as the Family Tree, applied to

Fulton County for certification in 1993 as a female business enterprise. (Doc. No. 55, First Cooper Aff. at ¶ 5, Exh. A). In the Minority/Female Business Enterprise Disclosure Statement, Peggy Webster was listed as the company's owner. (*Id.*). On December 1, 1993, Defendant Cooper, as Director of the Department, notified Peggy Webster that the Department had certified the company as a female business enterprise. (*Id.*). By letter dated March 4, 1995, Peggy Webster informed the Department that the company name had changed from the Family Tree to Green Thumb. In the letter, she requested that the company continue as a female business enterprise. (Doc. No. 55, First Cooper Aff. at ¶ 6, Exh. B). Although Green Thumb did not submit a new Minority/Female Business Enterprise Disclosure Statement, Cooper attested that the Department did not decertify or disqualify it from the MFBE Program. (*Id.* at ¶ 7).

On March 10, 1995, Fulton County opened a bid for tree removal services for the Department of Public Works. Ben Edwards Landscaping Company ("Edwards Landscaping"), a certified minority business enterprise owned by Ben Edwards, submitted a bid for the tree removal work. (Doc. No. 105, Second Moore Aff. at ¶ 3, Exh. A). Green Thumb also submitted a bid for the tree removal work. (Id., Exh. B). In its bid, Green Thumb specified that it is a female business enterprise. (*Id.*). On May 3, 1995, the Board awarded the bid to Green Thumb and Edwards Landscaping. On May 31, 1995, and June 3, 1995, Green Thumb and Edwards Landscaping were each issued Purchase Orders not to exceed $45,000. (*Id.* at ¶ 5, Exh. C). The Purchase Orders contained the following provision:

> This purchase order does not constitute an offer of or agreement by Fulton County to purchase goods and/or

> services for total consideration of any specific amount whatsoever. This purchase order authorizes payment for goods ordered and/or services requested by the Public Works Department/Office of Fulton County during the calendar year 1995; provides, however, that the total cost of all goods and/or services requested hereunder shall not exceed the aggregate total of $45,000 without issuance by Fulton County Purchasing Department of a written change order.

(*Id.* at ¶ 7, Exh. C). The purchase orders contained no promises or guarantees that either Green Thumb or Edwards Landscaping would receive any specific work or any specific amounts for any specific scope of work at any specific time. (*Id.*).

In June, 1995, Bill Mowrey, Field Operations Manager for Public Works, requested quotes from Edwards Landscaping and Green Thumb to remove trees around Spalding Drive, 5821 Lake Forest, and Mount Paran Road. (Doc. No. 110, Exh. O, Tab 8). Green Thumb bid $2,500 while Edwards Landscaping bid $3,800 for the project. (*Id.*). By memorandum dated August 3, 1995, Defendant Cooper informed Fred Artis, Director of the Public Works Department, of his concern that Green Thumb had received a purchase order in the amount of $11,800 for other projects while Edwards Landscaping had not been given any work out of its original $45,000 purchase order. (Doc. No. 110, Exh. O, Tab 1). Subsequently, by memorandum dated August 9, 1995, Mr. Mowrey stated that on each project Green Thumb had provided low bids and was able to do the work while Edwards Landscaping had given excuses why it could not do the work in a timely fashion. (*Id.*, Tab 3). In a memorandum dated August 11, 1995, Mowrey reported that Edwards

Landscaping failed to show up at Camp Creek to cut down six trees. (*Id.*). Nevertheless, he recommended giving Edwards Landscaping the work order to remove trees around Spalding Drive, 5821 Lake Forest, and Mount Paran Road despite the concerns over the extra costs and the ability of Edwards Landscaping to perform the work safely. (*Id.*). Mowrey's recommendation to assign that project to Edwards Landscaping was based on Cooper's August 3, 1995, memorandum. (*Id.*, Tab 8).

In 1996, the Board approved a renewal continuing the existing 1995 tree removal service arrangements with Edwards Landscaping and Green Thumb. Green Thumb ceased being a female business enterprise when it submitted its 1996 bid for landscape maintenance. (Doc. No. 110, Exh. N, Tab 4). Due to Fulton County procedures, new purchase orders were issued to Edwards Landscaping and Green Thumb. The purchase orders were initially issued to Green Thumb in the amount of $66,000 and Edwards Landscaping in the amount of $25,000. (Doc. No. 105, Second Moore Aff. at ¶ 9, Exh. D). In a memorandum dated January 26, 1996, Defendant Cooper stated that he had received a complaint from Edwards Landscaping regarding the tree removal projects. (Doc. No. 110, Exh. O, Tab 4). Cooper requested that Public Works provide a complete listing of all work performed by Green Thumb and Edwards Landscaping and any explanation if there was a significant difference in the amount of work performed by each company. (*Id.*). Bill Mowrey subsequently reported that Edwards Landscaping failed to meet any of the competence and safety minimum requirements and had caused property damage on the Mount Paran project. (*Id.*, Tab 6). He further stated that while he was mindful of the goals of the MFBE program, he did not believe that Fulton County was moving toward those goals

with Edwards Landscaping. (*Id.*). Nevertheless, he stated that he would do his best to provide Edwards Landscaping with work where there is virtually no risk to the public. (*Id.*).

In a memorandum dated February 15, 1996, from Defendant Cooper to Frank Bockman, Acting Public Works Director, Cooper stated that he had reviewed the 1995 records which showed a discrepancy in the amount of work assigned to Edwards Landscaping and Green Thumb. (*Id.*, Tab 7). Cooper stated that Ben Edwards of Edwards Landscaping was informed that Edwards Landscaping would not be awarded certain projects due to Mowrey's dislike of minority contractors. (*Id.*). Cooper stated that Mowrey's negative evaluation of Edwards Landscaping's work was vague and not based on any objective criteria. (*Id.*). Cooper requested that Mowrey be removed from the responsibility of assigning contracts and that Public Works honor its agreement to utilize Edwards Landscaping commensurate with the dollar value of the 1995-96 contract. (*Id.*). In a memorandum dated February 21, 1996, Mowrey responded by (1) disputing the accuracy of Cooper's February 15, 1996, memorandum; (2) recounting many shortcomings of Edwards Landscaping and its failure to carry out work assignments in a professional manner; and (3) denying any improper racial motive in assigning the work. (*Id.*, Tab 8).

Subsequently, Cooper canceled the initial 1996 purchase orders issued to Green Thumb and Edwards Landscaping based on the claim of unfair favorable treatment accorded to Green Thumb. (*Id.*, Tab 9). The 1996 purchase orders to Green Thumb and Edwards Landscaping were then reissued in equal amounts of $45,500. (*Id.*, Tabs 10, 11). Tony Moore, Budget and Revenue Manager for Public Works, informed Mowrey that both Green Thumb and Edwards

Landscaping were to be used equally. (*Id.*, Tab 10). In a memorandum dated March 1, 1996, Cooper stated that it was the Department's conclusion that Public Works "did intentionally direct the tree removal service contract and its funding so as to cause a disparity in business which discriminated against the minority contractor, [Edwards Landscaping]." (*Id.*, Tab 12). Bockman responded that there was no evidence of intentional discrimination against Edwards Landscaping. (*Id.*, Tab 13). He noted that the purchase orders do not guarantee the full amount of the order. (*Id.*). In his affidavit, Bockman states that he believes Cooper's primary concern was that Ben Edwards, the black owner of Edwards Landscaping, was not receiving as much business as the Websters, who are white. (Doc. No. 110, Exh. O, Bockman Aff. at ¶ 8).

In his affidavit, Daniel Webster testified that Mowrey had explained to him that the reduction in the 1996 purchase order was due to race. (Doc. No. 110, Exh. N, Daniel Webster Aff. at ¶ 4). Webster further stated that before the filing of the present Complaint, Green Thumb was on the Fulton County's mailing list and had frequently received post cards advising it of bids. (*Id.* at ¶ 5). However, after the filing of the Complaint, Green Thumb almost completely ceased receiving bid notifications. (*Id.*). Green Thumb never received a 1997 bid package for tree removal service despite its request and Fulton County's promise that it would receive one. (*Id.* at ¶ 8). In 1998, when Green Thumb bid on a Fulton County project for ground maintenance and was the low bid, Fulton County did not award it the contract. (*Id.* at ¶ 7).

In the Second Amended Complaint [Doc. No. 35], the Plaintiffs allege that Fulton County has, for at least two years,

carried out a systematic program of awarding contracts to minority-owned businesses when other qualified businesses owned by persons who were white and/or male have submitted lower bids. The Plaintiffs allege that the discrimination also extends (1) against black-owned businesses because of their association with white persons; and (2) in favor of some white or male businesses because of their association with black persons. The Plaintiffs allege that Fulton County has operated since September 16, 1994, an unlawful affirmative action program, the MFBE Program, which unreasonably and unlawfully burdens and discriminates against businesses based solely on the race and/or sex of the businesses' owners.

In the Second Amended Complaint, the Plaintiffs allege that Fulton County has refused on account of race to award a contract for work to Green Thumb on the Mount Paran project and instead improperly awarded it to a minority business enterprise, Edwards Landscaping, even though Edwards Landscaping was not qualified for the job and submitted a much higher bid than did Green Thumb. The Plaintiffs further allege that Fulton County, through Defendant Cooper, breached, because of race, a contract awarded to Green Thumb by reducing Green Thumb's initial 1996 purchase order by $20,500 and increasing Edwards Landscaping's initial 1996 purchase order by $20,500.

Pursuant to Federal Rule of Civil Procedure 23, the Plaintiffs seek certification of the following proposed class: "All persons who have placed bids to provide goods or services to Fulton County, Georgia in the two years prior to the filing of this Complaint, and have been partially or fully rejected or suffered differential treatment on account of their race (white), because of their gender (male), or because of their

association with white and/or male persons." The Plaintiffs seek class certification under Rule 23(b)(2) insofar as this Complaint seeks to enjoin further implementation of the Fulton County MFBE. The Plaintiffs seek class certification under either Rule 23(b)(2) or (3) insofar as all other counts involve a "hybrid class action." Their motion for class certification is pending before the Court [Doc. No. 46].

The Plaintiffs assert in Count I of the Second Amended Complaint that the Defendants unlawfully discriminated against the Plaintiffs on the grounds of race and sex in violation of § 1981 and the Equal Protection Clause, as enforced by 42 U.S.C. § 1983. In Counts II and III, the Plaintiffs assert that Defendant Fulton County has discriminated against the class of plaintiffs on the basis of race and sex, in violation of § 1981 and the Equal Protection Clause, by its policy, pattern or practice of discriminating on the basis of race in awarding contracts for goods and services. In Count IV, the Plaintiffs assert that the Defendants have violated the Equal Protection Clause of the Georgia Constitution, Art 1, § 1, ¶ 2. In Count V, the Plaintiffs assert that the Defendants impermissibly committed the acts in violation of O.C.G.A. § 48-5-220 to give tax money to persons for no reason other than their race. In Count VI, the Plaintiffs assert a retaliation claim under Section 1981 and the Equal Protection Clause. The Plaintiffs seek declaratory, injunctive and monetary relief.

The Plaintiffs have moved for summary judgment [Doc. No. 103] on their claims that the Fulton County MFBE Program is unconstitutional and should be enjoined. They contend that (1) a race-based preference scheme must be subjected to strict scrutiny to determine whether the program is narrowly tailored to achieve a compelling governmental interest; (2) a

gender-based preference scheme must be subjected to intermediate scrutiny whereby the court analyzes whether the classification serves important governmental objectives and is substantially related to their achievement. They contend that the MFBE Program fails both tests. They contend that Fulton County has failed to show sufficient evidence of actual discrimination, whether active or passive, to justify any program of racial or gender preference. The Plaintiffs contend that the race and gender-conscious MFBE Program is not narrowly tailored to remedy precise evidence of discrimination. Specifically, they contend that (1) Fulton County has failed to take any steps to access the impact of the MFBE Program on innocent third parties; (2) Fulton County adopted a race-based preference program without giving serious and good-faith consideration to race-neutral measures; (3) the numerical goals of the MFBE Program far exceed the availability of minorities and females in the relevant market; and (4) the MFBE Program is not sufficiently limited in either duration or geographic scope.

The Defendants have also filed a Motion for Summary Judgment [Doc. No. 105], offering numerous contentions in support of dismissing every claim asserted against them. The Defendants first contend that the Plaintiffs lack standing to assert their claims. They contend that (1) the Plaintiffs lack standing to challenge the MFBE Program; (2) the Plaintiffs lack standing to assert a practice or pattern of racial or gender discrimination by Fulton County; and (3) Plaintiff Goff lacks standing to sue for injunctive relief. The Defendants contend that the Fulton County MFBE Program is constitutional based on evidence identifying past discrimination against minority and female business enterprises. Based on the evidence presented, the Defendants contend that Fulton County had a compelling interest in remedying past discrimination and that

Fulton County properly considered and implemented race and gender-neutral remedies. The Defendants contend that the MFBE Program is narrowly tailored to remedy past discrimination based on its flexibility toward reaching goals and its graduation, waiver and sunset provisions. The Defendants contend that Green Thumb and the Websters are constitutionally estopped from challenging the MFBE Program because Green Thumb benefitted from the program as a female business enterprise. The Defendants contend that the Plaintiffs waived their right to challenge the MFBE Program by their participation. The Defendants contend that the Plaintiffs are barred from obtaining injunctive relief under the doctrine of unclean hands as they have each manipulated the MFBE Program.

The Defendants contend that the Plaintiffs are not entitled to relief against Fulton County pursuant to Section 1981, Section 1983, or the Equal Protection Clause because they have failed to establish a pattern or practice of discrimination. The Defendants contend that the Plaintiffs' claims against the individual Defendants fail due to lack of specific evidence of individual discrimination. Next, the Defendants contend that the Plaintiffs' claim against the individual Defendants in their individual capacities are barred because the individual Defendants are entitled to either absolute legislative immunity or qualified immunity. They contend that the Plaintiffs' Section 1981 claims are foreclosed because Section 1983 claims for damages constitute the exclusive federal remedy for violation of the rights guaranteed in a Section 1981 action. The Defendants contend that the Plaintiffs' retaliation claim fails due to insufficient evidence and the absence of a retaliation cause of action where the government fails to award contracts to independent contractor bidders.

The Defendants contend that the Plaintiffs have failed to establish a violation of either the federal Equal Protection Clause or the Georgia counterpart, which are co-extensive. The Defendants contend that the Plaintiffs have no cause of action under O.C.G.A. § 48-5-220 because that statute does not provide either a basis for the Plaintiffs' claim or a private right of action in general. The Defendants contend that the Plaintiffs claims against Fulton County are barred under O.C.G.A. § 36-11-1 because the Plaintiffs failed to provide the County with written notice of their claims within the specified 12-month period. The Defendants contend that punitive damages cannot be assessed against the individual Defendants because they cannot be held liable for punitive damages in their official capacities and can only be liable for punitive damages in their individual capacities if their conduct is motivated by evil motive or involves reckless indifference to the federally-protected rights of others. The Defendants contend that any damages awarded in this case should be limited under Georgia law to bid costs.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non movant. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-159, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-

movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

At the summary judgment stage, the court's function is not to weigh the evidence to determine the truth of the matter, but to determine whether a genuine issue of material fact exists for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510. "If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant summary judgment." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (11th Cir. 1995). "Where the record taken as a whole could not lead a rationale trier of fact to find for the nonmoving party," summary judgment for the moving party is proper. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

III. DISCUSSION

A. MOTION TO STRIKE BRUNS AFFIDAVIT

In their opposition to the Defendants' summary judgment motion, the Plaintiffs submitted the affidavit of Thomas Bruns, who served from 1994 through 1997 as the Deputy Director of Purchasing for Fulton County. The Plaintiffs presented Bruns' testimony as evidence of Fulton County's pattern or practice of discrimination. The Defendants have filed a Motion to Strike Bruns' Affidavit [Doc. No. 119]. They contend that the affidavit should be stricken because it (1) does not show that he has personal knowledge and fails to provide any factual foundation; (2) contains conclusory and

speculative allegations; and (3) bases its conclusory allegations upon hearsay statements that are inadmissible as evidence.

Federal Rule of Civil Procedure 56(e) provides that an affidavit opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavits based upon "information and belief" are insufficient. *Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827, 831, 70 S. Ct. 894, 896, 94 L. Ed. 1312 (1950). The court may consider only that evidence that would be admissible at trial. *Soles v. Board of Com'rs of Johnson County, Ga.*, 746 F. Supp. 106, 110 (S.D. Ga. 1990). Thus, in determining summary judgment motions, the court will refuse to consider inadmissible hearsay. *Id.* On a summary judgment motion, the court "will disregard only the inadmissible portions of a challenged affidavit and will consider the admissible portions in determining whether to grant or deny the [summary judgment] motion." *Lee v. National Life Assur. Co. of Canada*, 632 F.2d 524, 529 (5th Cir. 1980).

In the affidavit, Bruns states that in his position as Deputy Director of Purchasing for Fulton County, he "oversaw the day-to-day operations of the Purchasing Department" and "had an opportunity to observe all aspects of purchasing at Fulton County, Georgia during this time." (Doc. No. 110, Bruns Aff. at ¶ 3). The Court finds that Bruns had personal knowledge of purchasing sufficient for him to testify about the matters contained in his affidavit. The Court further finds that his testimony contains sufficient specificity about Fulton County's purchasing practices. Rather than striking the

Bruns affidavit or any portions contained therein based on inadmissibility, the Court will simply disregard any inadmissible hearsay statements and consider the admissible portions in determining whether to grant the Defendants' summary judgment motion. Accordingly, the Defendants' Motion to Strike the Bruns Affidavit is denied.

B. CONSTITUTIONALITY OF THE MFBE PROGRAM

1. STANDING

As a threshold inquiry, the Court must first consider the question of standing. Standing is a jurisdictional question, and the federal courts are under an independent obligation to analyze their own jurisdiction. *Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 903 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004, 118 S. Ct. 1186, — L. Ed. 2d — (1998). In addressing an affirmative action set-aside program for contractors' services, the Supreme Court has stated that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside

> program ... need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing.

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Fla., 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586 (1993).

The Court is satisfied that Plaintiffs Daniel Webster, Peggy Webster and Green Thumb have standing to challenge the constitutionality of the MFBE Program. The evidence shows that Green Thumb was a female business enterprise through 1995. Nevertheless, these Plaintiffs have demonstrated that they have bid for contracts from Fulton County in 1995 and 1996 and that the participation goals for minority business enterprises in the MFBE Program potentially prevented Green Thumb from competing on an equal footing with minority business enterprises. In the words of the Tenth Circuit addressing a similar argument:

> [W]e conclude that [Plaintiff] has demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. Specifically, the unequal nature of the bidding process lies in the Ordinance's requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). In contrast, minority and women-owned prime contractors may use their own work to satisfy MBE and WBE participation goals.... Thus, the extra requirements impose costs and burdens on nonminority

firms that preclude them from competing with MBEs and WBEs on an equal basis.

Concrete Works of. Colorado, Inc. v. City and County of Denver, 36 F.3d 1513, 1518-19 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004, 115 S. Ct. 1315, 131 L. Ed. 2d 196 (1995). Contrary to the Defendants' contention, the Court further finds that the Websters and Green Thumb have standing to challenge the constitutionality of the MFBE Program as it pertains to all applications. Accordingly, the Defendants' standing argument as to the MFBE Program is without merit.[1/]

In a previous Order, the Court dismissed the claims of Plaintiff Minority Distributing Corporation and Willie Hill. The Court also held that a purported assignment by Minority Distributing to Kelly Goff of the corporation's interest in this lawsuit is invalid. Goff has not shown that he individually has ever bid on a Fulton County contract or that he is likely to bid on such a contract in the future. It is well established that shareholders lack standing to bring a Section 1983 or 1981 action claiming injury to the corporation in which they own shares. *Bellows v. Amoco Oil Company*, 118 F.3d 268, 276-77 (5th Cir. 1997), *cert. denied*, 522 U.S. 1068, 118 S. Ct. 739, 139 L. Ed. 2d 675 (1998); *Flynn v. Merrick*, 881 F.2d 446, 449-50 (7th Cir. 1989); *Forest Ambulance Service, Inc. v. Mercy Ambulance of Richmond, Inc.*, 952 F. Supp. 296, 304 (E.D. Va. 1997); *Sawmill Products, Inc. v. Town of Cicero*, 477 F. Supp. 636, 638-39 (N.D. Ill. 1979). Goff is

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[1] The Second Amended Complaint does not state whether Green Thumb is a corporation, partnership or sole proprietorship. The parties have not addressed the implications of this and the Court will ignore this as long as the parties do so.

not even a current shareholder in the Minority Distributing Corporation. He has no standing to assert any claim in this action. Therefore, the Defendants are entitled to summary judgment as to Plaintiff Goff.

2. CONSTITUTIONAL ESTOPPEL, WAIVER, UNCLEAN HANDS

The Defendants contend that the Webster Plaintiffs are constitutionally estopped from challenging the MFBE Program because they benefitted from the program when Green Thumb was a certified female business enterprise. The Defendants further contend that the Plaintiffs waived their right to challenge the MFBE Program by their participation. The Supreme Court has held that "[i]t is an elementary rule of constitutional law that one may not 'retain the benefits of [a statute or regulation] while attacking the constitutionality of one of its important conditions,'" *Fahey v. Mallonee*, 332 U.S. 245, 255, 67 S. Ct. 1552, 1557, 91 L.Ed. 2030 (1947) (citation omitted). However, the Supreme Court later limited the doctrine of constitutional estoppel to situations where the plaintiff owes its very existence to the statute it challenges. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456, 108 S. Ct. 2481, 2486, 101 L. Ed. 2d 399 (1988). As the Supreme Court noted in Kadrmas in response to an invocation of the constitutional estoppel doctrine, "[a]ppellants obviously are not creatures of any statute, and we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." *Id.* at 456-57, 108 S. Ct. at 2486.

In this case, the Plaintiffs clearly do not owe their existence to the creation of the MFBE Program. While they have benefitted from the program when Green Thumb was

certified as a female business enterprise, the Plaintiffs are not constitutionally estopped from asserting their claim that the MFBE Program is unconstitutional. The Court also finds that the Plaintiffs have not waived their right to challenge the MFBE Program due to their participation in the program as a female business enterprise. Finally, the Defendants contend under the doctrine of unclean hands that the Plaintiffs are barred from obtaining injunctive relief with regard to the MFBE Program. The Defendants contend that the Plaintiffs misrepresented the ownership and control of Green Thumb to be eligible for female business enterprise status. The Court finds that this argument is without merit and requires no extended discussion.

3. LEGAL STANDARDS FOR SCRUTINIZING PREFERENCE PROGRAMS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. The Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), set forth the constitutional standard applicable for programs establishing racial or ethnic preferences. The Court applied the strict scrutiny test, which requires a "searching judicial inquiry into the justification" for the preference to determine whether the classifications are either remedial or "in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493, 109 S. Ct. at 721. The strict scrutiny test is therefore designed to expose "illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and to "ensure that the means chosen 'fit' this compelling goal so closely that there is little or no

possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.* Accordingly, the strict scrutiny test requires that racial or ethnic preference programs "must be based upon a 'compelling governmental interest' and must be 'narrowly tailored' to achieve that interest." *Engineering Contractors*, 122 F.3d at 906 (citation omitted). Explicit racial preferences may not be used except as a "last resort." *Id.* at 926.

To uphold a racial or ethnic preference program, the district court must make a factual determination that a strong basis in evidence exists to support the conclusion that the remedial racial or ethnic program is necessary. *Engineering Contractors*, 122 F.3d at 906. General, amorphous claims of societal discrimination, simple legislative assurances of good intention, or congressional findings of discrimination in the national economy are not sufficient to establish a "strong basis in evidence." *Id.* at 907. Nevertheless, a racial or ethnic preference program can be justified by demonstrating gross statistical disparities between the proportion of minorities hired for projects or contracts, and the proportion of minorities willing and able to do the work. *Id.* Anecdotal evidence may be used to establish discrimination, especially if buttressed by relevant statistical evidence. *Id.* Accordingly, if Fulton County can show that it has become a "'passive participant' in a system of racial exclusion practiced" in connection with the awards of projects and contracts in the county, the Supreme Court has made it "clear that the [county] could take affirmative steps to dismantle such a system." *Croson*, 488 U.S. at 492, 109 S. Ct. at 721. The following four factors provide a useful analytical structure for determining whether a race or ethnicity-conscious program is narrowly tailored: (1) necessity for the relief and the efficacy of alternative remedies; (2) the

flexibility and duration of the relief, including availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact on the rights of innocent third-parties. *Engineering Contractors*, 122 F.3d at 927.

Intermediate scrutiny is the applicable constitutional standard for analyzing programs that establish gender preferences. *Engineering Contractors*, 122 F.3d. at 907-08. Thus, to withstand constitutional challenge to a gender preference program, such gender preference must serve important governmental objectives and be substantially related to achievement of those objectives. *Id.* The proponent of a gender preference program must present sufficient probative evidence of discrimination. *Id.* at 910 The Eleventh Circuit recognized that the "sufficient probative evidence" standard is less stringent than the "strong basis in evidence" required to bear the weight of a race or ethnic preference program. *Id.* at 909-10. The following guidelines set forth the boundaries of intermediate scrutiny evidentiary analysis: (1) the local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself; and (2) such review "is not to be directed toward mandating that gender-conscious affirmative action is used only as a 'last resort'." *Id.* at 910.

In making its factual determination that either a "strong basis in evidence" or "sufficient probative evidence" exists to support the necessity of an affirmative action program, the court may consider post-enactment evidence in addition to pre-enactment evidence. *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 943 F. Supp. 1546, 1557 (S.D. Fla. 1996); *aff'd*, 122 F.3d 895 (1997). Pre-enactment evidence pertains to

evidence developed before Fulton County enacted the MFBE Program, and thus, could have been relied upon by the Board in adopting the MFBE Program. *Id.* Conversely, post-enactment evidence pertains to evidence developed after the MFBE Program was enacted and was therefore not relied upon as a rationale for the program. *Id.* The Eleventh Circuit has held that post-enactment evidence may be introduced into the record to determine the constitutionality of a race or gender preference program:

> Although *Croson* requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer must have already proved that it has discriminated. On the contrary formal findings of discrimination need neither precede nor accompany the adoption of affirmative action.

Engineering Contractors, 122 F.3d at 911 (*quoting Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994)). Consideration of post-enactment evidence is appropriate when scrutinizing race or gender preference programs because a violation of either federal statutory or constitutional requirements arises when the wrong is committed, and not with the making of a finding. *Engineering Contractors*, 122 F.3d at 911 (*citing Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 289, 106 S. Ct. 1842, 1855, 90 L. Ed. 2d 260 (1986) (O'Connor, J., concurring)). Consideration of post-enactment evidence is especially appropriate where the principal relief sought is injunctive relief. *Engineering Contractors*, 122 F.3d at 911.

The Defendants bear the initial burden of production to demonstrate a "strong basis in evidence" or "sufficient probative evidence" that the race, ethnic or gender preference program aims to remedy past or present discrimination and is constitutional under the Fourteenth Amendment. *Engineering Contractors*, 122 F.3d at 916; *Concrete Works*, 36 F.3d at 1522. Notwithstanding this initial burden of proof, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Concrete Works*, 36 F.3d at 1522 (*quoting Wygant*, 476 U.S. at 277-78, 106 S. Ct. at 1849). As explained by the Eleventh Circuit in the context of public employment, once the proponent of a race preference plan:

> introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority [employees] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [public employer's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored."

Howard v. McLucas, 871 F.2d 1000, 1007 (11th Cir. 1989) (*quoting Wygant*, 476 U.S. at 293, 106 S. Ct. at 1856 ((O'Connor, J., concurring)).

4. THE EVIDENCE

The Defendants have presented two types of evidence in support of the MFBE Program: (1) statistical evidence and (2) anecdotal evidence. The Court will review the evidence to determine whether the Defendants have demonstrated both the "strong basis in evidence" standard in connection with the race preference program and the less stringent "sufficient probative evidence" standard in connection with the gender preference program. The Court is mindful that this case is at the summary judgment stage, where the Court's task is not to weigh the evidence, but rather to discern whether "the record taken as a whole could not lead a rationale trier of fact to find for the nonmoving party." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356.

The Defendants have presented the Brimmer-Marshall Study and the 1994 post-disparity study containing statistical evidence of past discrimination against minorities and females. (Doc. No. 105, Marshall Aff., Exhs. B and C; Boston Aff., Exhs. A-K; Second Cooper Aff., Exhs. A-M). The Brimmer-Marshall Study found large disparities in public and private contracting opportunities between minority and majority firms. (Doc. No. 105, Marshall Aff., Brimmer-Marshall Study, Part I at 88). The Brimmer-Marshall Study concluded that there was low participation by minority business enterprises in Atlanta contracting relative to the value of the contracts awarded to non-minority business enterprises. (*Id.* at 99). The Study relied on the statistical criterion establishing

> a ratio of "contract dollars" going to minority business enterprises in a given year to the fraction of "available" businesses which were minority-owned in that year. This

> statistical relationship . . . [is] the "Utilization Percentage Ratio," or UPR. If the value of the resulting ratio or index is equal to 1.00, there is no discrimination; if it is significantly less than 1.00, this provides evidence of racial discrimination.

(*Id.* at 101). In the years 1972, 1977 and 1982, the resulting UPR's, or disparity indices, for black-owned businesses for the Atlanta Standard Metropolitan Statistical Area ("SMSA") and Fulton County computed under 20% for all industries and under 27% for construction and developers. (*Id.* at 103). The Eleventh Circuit has recognized that disparity indices greater than 80% are generally not considered indications of discrimination. *Engineering Contractors*, 122 F.3d at 914. The Brimmer-Marshall Study provides, therefore, some statistical evidence of discrimination in terms of disparity indices for minority business enterprises for the period between 1972 and 1982. (*Id.*, Part V).

The 1994 post-disparity study, prepared by Dr. Boston, evaluated the utilization of minority or female vendors by Fulton County from 1990-1993. (Doc. No. 105, Boston Aff., Exh. C). In this study, Dr. Boston concluded that minority and female firms totaled approximately 35% of all available firms. (*Id.*, Table 19(a)). The numbers broke down as follows: (1) African-Americans – 28.6%; (2) white females – 3.55%; (3) Hispanics – 1.22%; (4) Asians – 1.83%; and (5) Native-Americans – .25%. (*Id.*). The post-disparity study reflects that from 1990 through 1993, the average utilization of minorities totaled 19.63% and the average utilization of females totaled 1.43%. (*Id.*, Table 19(c)). The study provides statistical evidence of discrimination between 1990 and 1993 in terms of the disparity indices of less than 80% for minority and female business enterprises, provided that

there is credible evidence that minority and female firms constituted 35% of all available firms. (*Id.*, Table 19(d)).

As discussed above, the Plaintiffs have the ultimate burden to show that the MFBE Program is unconstitutional. When statistical evidence is sufficient to support an inference of discrimination, the Plaintiffs have at least the following three methods to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant or actionable; or (3) present conflicting statistical data. *Engineering Contractors*, 122 F.3d at 916. The Plaintiffs have presented several reports by Dr. George Easton, who analyzed, among other things, the validity of the statistical data contained in the Brimmer-Marshall Study and the 1994 post-disparity study. (Doc. No. 110, Exh. Y). He concluded that Part V of the Brimmer-Marshall Study does not contain credible statistical evidence of underutilization of minority business enterprises in Fulton County. (*Id.*). Dr. Easton disputes the methodology of the 1994 post-disparity study as well as the study's failure to identify the source of the data used. (*Id.*). The Plaintiffs have presented a database, based on contract awards from 1990-1993, from the Fulton County Purchasing Department showing the availability of minority and female firms to be no more than 24% based upon bidding percentages, much lower than the 35% reported in the post-disparity study. (Doc. No. 103, Exh. N). Plaintiffs' expert contends that there is no credible evidence that minority and female business enterprises constitute 35% of the business enterprises in the Atlanta metropolitan area. In his Rebuttal Report, Plaintiffs' expert contends that reliable census data shows that only 15% of available firms are minority or female owned enterprises, less than half of the set aside percentage of 35%. (Doc. 110,

Ex. Y). Plaintiffs contend that Dr. Boston has admitted that the 35% figure is arrived at by adding some arbitrary figure to compensate minorities for past discrimination. This sort of speculative guesswork as to the position minorities would be in but for past discrimination is prohibited. *Engineering Contractors*, 122 F.3d at 912. Plaintiffs' expert offers statistical evidence that from 1994 to the present, minority and female business enterprises are greatly over-represented in the award of contracts by Fulton County in relation to their availability in the marketplace. The Plaintiffs also cite the fact that the 1994 post-disparity study completely excludes commodity purchases for 1990, 1991 and 1992 and yet, Fulton County included commodity purchases in the MFBE Program.

Overall, the Defendants have presented substantial statistical evidence to support their contention that the MFBE Program was enacted to remedy past discrimination against minority and female business enterprises. The Defendants have supported this statistical evidence with anecdotal evidence of discrimination as contained in the Brimmer-Marshall Study. (Doc. No. 105, Marshall Aff., Exh. B, Part II). Nevertheless, the Court finds that the Plaintiffs, as discussed above, have identified potential flaws in the statistical evidence propounded by the Defendants and have presented evidence that the Defendants' statistical evidence is flawed in its methodology or assumptions, and fails to support an inference of discrimination sufficient to justify a 35% set aside program. "[T]he adequacy of a municipality's showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality." *Concrete Works*, 36 F.3d at 1522; *Croson*, 488 U.S. at 498, 109 S. Ct. at 724.

At the summary judgment stage, the Court cannot weigh the evidence and is unable to determine that the record as a whole would lead the reasonable fact finder to one inference. *See Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356. Upon examination of the entire record, the Court concludes that genuine issues of fact exist as to (1) the accuracy of the Defendants' statistical data and (2) whether either the "strong basis in evidence" or the "sufficient probative evidence" standard was satisfied to prove that the MFBE Program aims to remedy past or present discrimination.

> Either a program is grounded on a proper evidentiary factual predicate or it is not. If it is, then that program sails on to the next stage of the analysis, where each component contract measure is tested against the "narrow tailoring" and "substantial relationship" requirements. On the other hand, if a program is not grounded on a proper evidentiary basis, then all of the contract measures go down with the ship, irrespective of any narrow tailoring or substantial relationship analysis.

Engineering Contractors, 122 F.3d at 906. Therefore, it is not necessary at this stage to address the narrow tailoring and substantial relationship requirements. That can be done only after a finding at trial that the MFBE Program utilizing highly suspect racial and suspect gender preferences is based upon a proper evidentiary basis.

C. THE PLAINTIFFS' INDIVIDUAL CONSTITUTIONAL CLAIMS AGAINST THE DEFENDANTS

In the Second Amended Complaint, the Plaintiffs assert that the Defendants have discriminated against the Plaintiffs and the purported class, in violation of Section 1981 and the

Equal Protection Clause as enforced by Section 1983, by its policy, pattern and practice of discriminating on the basis of race and sex in awarding contracts for goods and services. The Defendants contend that the Plaintiffs are not entitled to relief against Fulton County because they have failed to establish a pattern or practice of discrimination. The Defendants contend that the Plaintiffs' claims against the individual Defendants fail due to lack of specific evidence of individual discrimination. As an initial matter, the Defendants contend that the Plaintiffs lack standing to assert any claim that Fulton County engaged in a pattern or practice of discrimination. The Plaintiffs have alleged that the systematic awarding of contracts to minority or female business enterprises under the MFBE caused them injury in connection with the awarding of the Mount Paran project to Edwards Landscaping. The Court finds that the Plaintiffs have standing to assert their "pattern or practice" claims.

The Supreme Court has held that a local government, including a county, is liable pursuant to Section 1983 for its policies that cause constitutional violations. *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 117 S. Ct. 1734, 1736, 138 L. Ed. 2d 1 (1997) (*citing Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38, 56 L. Ed. 2d 611 (1978)). These policies may be set by the government's lawmakers or by those individuals whose actions may fairly represent official policy. *McMillian*, 117 S. Ct. at 1736. A suit against a government officer in his official capacity is the same as a suit against the entity of which the officer is the agent. *Id.* at 1736-37 n.2. In contrast, a suit against a government official in his individual capacity seeks to impose liability upon that official for actions he takes under the color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985). To

establish individual liability against a government official in a Section 1983 action, the plaintiff must show that the official's acts caused the deprivation of a federal right. *Id.* at 166, 105 S. Ct. at 3105. The Court concludes that the Plaintiffs properly brought suit against Fulton County and the individual Defendants in their official capacities based on the claim that the MFBE Program is illegal and the claim that there is a policy and practice of intentional racial discrimination in awarding contracts to prospective bidders.

The evidence presented demonstrates that the Board adopted and approved the MFBE Program, including the 1994 amendments. A review of the MFBE Program shows that Cooper, as the Department's Director, retains discretion to recommend participation goals for minority and female business firms, subject to Board approval, and to grant waivers to the stated goals. The Plaintiffs have presented statistical evidence from Dr. George Easton to dispute the accuracy of the statistical evidence justifying the MFBE Program's participation goals for minorities and females. The Plaintiffs have also presented anecdotal evidence showing instances where Fulton County (1) set aside contracts for minority and female business enterprises; (2) disqualified non-minority firms even where the non-minority firm is the low bidder; and (3) diverted portions of bids to higher-bidding MFBE firms, thereby constituting discriminatory bid-splitting. (Doc. No. 110, Exhs. A, B, F, G, I, and J). The Plaintiffs have further presented evidence that Fulton County, under the direction of Defendant Cooper, impermissibly awarded a contract for work on the Mount Paran project to a minority business enterprise where Plaintiff Green Thumb was the more qualified firm for the project. (*Id.*, Exh. O). The Court finds that the totality of the evidence presented by the Plaintiffs creates genuine issues of fact as to

whether Fulton County engaged in a pattern or practice of race or sex discrimination that caused injury to the Plaintiffs. Finally, the Court finds that genuine issues of material fact exist as to whether Defendant Cooper intentionally discriminated against the Plaintiffs and is liable in his individual capacity.

The Defendants contend that the acts of the individual Board members in proposing and adopting the MFBE Program are "quintessentially legislative." Thus, they contend that they are absolutely immune to suit under Section 1983. They further contend that Defendant Cooper's acts in drafting and proposing amendments to the MFBE Program were integral to the legislative process and that he is therefore entitled to absolute legislative immunity. The Supreme Court has held that legislators are entitled to absolute immunity from liability under Section 1983 for their legislative activities. *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 970, 140 L. Ed. 2d 79 (1998). "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 118 S. Ct. at 972 (citation omitted). "[O]fficials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Id.* at 973. An act or action is considered legislative when it is policymaking and of general application. *Woods v. Gamel*, 132 F.3d 1417, 1420 (11th Cir. 1998). Absolute legislative immunity extends to state, regional and local legislators. *Id.* at 1419. Nevertheless, not all actions taken by local legislators are entitled to absolute immunity. A decision by a local legislator which is an application of a policy to a specific party under specific facts is not protected by legislative immunity. *See Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1392 (11th Cir. 1993), *cert. denied*, 511 U.S. 1018, 114 S. Ct. 1400, 128 L. Ed. 2d

73 (1994). Accordingly, the Board member Defendants and Defendant Cooper are absolutely immune from liability to the extent that the Plaintiffs seek liability for any actions taken by the Defendants in approving and adopting the MFBE Program.

The individual Defendants next contend that they are entitled to qualified immunity because the Plaintiffs cannot show that the Defendants violated clearly established law regarding administration of the MFBE Program. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known . . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The existence of Supreme Court cases or cases from this circuit recognizing a right helps determine whether the right is clearly established to a reasonably competent official. *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993). The principal rights allegedly violated by the individual Defendants, the Section 1981 and equal protection rights to be free from sex and racial discrimination were clearly established at the time the Plaintiffs sought the contract award for the Mount Paran project. However, it was not clear that the administration of the MFBE Program by the Board Defendants was clearly a violation of those rights in the situation. *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149-50 (11th Cir. 1994) (*en banc*). Therefore, the individual Defendants, other than Defendant Cooper, are entitled to claim qualified immunity and are entitled to summary judgment on the Plaintiffs'

discrimination claims in Counts I, II and III of the Second Amended Complaint. Defendant Cooper is not entitled to qualified immunity as to the Plaintiffs' claim that he discriminated against them because of their race in awarding contracts to Edwards Landscaping, and not to Green Thumb, and in reducing the 1996 purchase orders for tree removal.

In the Second Amended Complaint, the Plaintiffs assert a retaliation claim under Section 1981 and the Equal Protection Clause on the ground that the Defendants refused to award contracts to the Plaintiffs after Fulton County was first notified of the claims in this action. The Defendants contend that the Plaintiffs' retaliation claim fails due to insufficient evidence and the absence of a retaliation claim where the government fails to award contracts to independent contractor bidders. This Court has found no authority to support a specific retaliation claim under Section 1981 or the Equal Protection Clause for the local government's failure to award contracts to independent contractor bidders. *Cf. Board of County Com'rs v. Umbehr*, 518 U.S. 668, 685, 116 S. Ct. 2342, 2352, 135 L. Ed. 2d 843 (1996) (in allowing that an independent contractor bring a retaliation claim for retaliatory termination of an existing contract based on protected speech activities, the Supreme Court noted that such holding does not address "the possibility of suits by bidders or applicants for new government contracts"); *Ratliff v. DeKalb County*, 62 F.3d 338, 341 (11th Cir. 1995) (the court recognized that constitutional claim for retaliation may be brought under Section 1983 under the First Amendment, and not the Equal Protection Clause). Accordingly, the Court finds that the Defendants are entitled to summary judgment as to the Plaintiffs' retaliation claim in Count VI of the Second Amended Complaint.

Section 1981 covers claims for intentional racial discrimination in "the making, performance, modification and termination of [employment] contracts" and in "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981. Success on a Section 1981 claim requires proof of intentional discrimination. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S. Ct. 935, 117 L. Ed. 2d 106 (1992). The Defendants contend that the Plaintiffs' Section 1981 claims are foreclosed because Section 1983 claims for damages constitute the exclusive federal remedy for violation of the rights guaranteed in a Section 1981 action. In *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 2722, 105 L. Ed. 2d 598 (1989), the Supreme Court held that Section 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by Section 1981 when the claim is pressed against a state actor." *Id.* at 733, 109 S. Ct. at 2722. Notwithstanding this controlling authority, the Plaintiffs respond that the 1991 amendments to the Civil Rights, specifically the amendment adding subsection (c) to Section 1981, overruled *Jett* to create an express cause of action for violations of Section 1981 by state actors. Subsection (c) to Section 1981 provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law." Pub. L. 102-166, Title I, § 101 (1991), 105 Stat. 1071, as amended, 42 U.S.C. § 1981(c).

The Eleventh Circuit has yet to consider whether Section 1981(c) overruled *Jett*. The district courts have split as to whether *Jett* was overruled. *Cf. Johnson v. City of Fort Lauderdale*, 903 F. Supp. 1520 (S.D. Fla. 1995), *aff'd*, 148

F.3d 1228 (11th Cir. 1998), *with La Compania Ocho, Inc. v. United States Forest Service*, 874 F. Supp. 1242 (D.N.M. 1995). This Court agrees with the well-reasoned Johnson case which concluded that subsection (c) is consistent with *Jett* and does not create an express cause of action under Section 1981. *Johnson*, 903 F. Supp. at 1522-23. Thus, the only means for the Plaintiffs to seek redress for rights protected by Section 1981 is through a Section 1983 action. In all of the Plaintiffs' counts asserting Section 1981 violations, they have sought relief as enforced by Section 1983. Accordingly, while the Defendants are technically correct with their argument, the Court will not dismiss any of the Plaintiffs' constitutional claims.

The Defendants correctly assert that municipalities and municipal officers in their official capacity are not liable for punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616 (1981); *Rankin v. City of Philadelphia*, 963 F. Supp. 463, 477 (E.D. Pa. 1997); *Scheideman v. Shawnee County Bd. of County Com'rs*, 895 F. Supp. 279, 283 (D. Kan. 1995). Government officials sued in their individual capacities may be held liable for punitive damages upon a showing that the Defendants' conduct is "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632 (1983). The Defendants contend that no evidence has been presented that the individual Defendants were motivated by an evil motive or intent, or that they acted in reckless or callous indifference to the Plaintiffs' federally-protected rights. All of the individual capacity claims against the Board member Defendants have been dismissed. Therefore Fulton County and the Board member Defendants are entitled to summary

judgment as to the claim for punitive damages. The Court finds that enough evidence has been presented to create genuine issues of fact as to whether Defendant Cooper should be liable for punitive damages if the jury finds that he engaged in intentional discrimination on the basis of race.

The Defendants contend that damages, to the extent they are awarded in this case, should be limited to bid costs. The Georgia Supreme Court has held that the only remedy in money damages under Georgia law for a disappointed bidder is the reasonable cost of preparation of the bid. *City of Atlanta v. J.A. Jones Constr. Co.*, 260 Ga. 658, 659, 398 S.E.2d 369, 370-71 (1990).

> When, as here, a governmental entity has frustrated the bid process and awarded the contract to an unqualified bidder, the injured low bidder may bring an action for appropriate relief. However, a low bidder whose bid is unfairly rejected is entitled to an award of reasonable costs of bid preparation.

Id. at 659, 398 S.E.2d at 370 (citations omitted). The Georgia Supreme Court further held that an award based on a Section 1983 claim for denial of due process constituted an impermissible double recovery. In rejecting the Defendants' contention that damages should be limited to bid costs, the Court finds that the *City of Atlanta* decision is inapposite to the present case. In contrast to the *City of Atlanta* case, the Plaintiffs here have not sought a state law recovery based on the bid process for contracts. Further, this case involves federal claims of race and sex discrimination in the award of contacts, and these claims were not present in the Georgia case. Accordingly, the Court finds any damages awarded in this case are not limited to bid costs.

D. GEORGIA EQUAL PROTECTION CLAUSE

In Count IV, the Plaintiffs assert that the Defendants have violated the Equal Protection Clause of the Georgia Constitution, Art 1, § 1, ¶ 2. In support of their summary judgment motion, the Defendants contend that the Plaintiffs are not entitled to relief under the Georgia equal protection clause. The Georgia equal protection clause and the Equal Protection Clause of the Fourteenth Amendment are coextensive. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 400, 467 S.E.2d 875, 881 (1996); *Grissom v. Gleason*, 262 Ga. 374, 376, 418 S.E.2d 27, 29 (1992). The Plaintiffs do not specify what relief, if any, over and above the relief to which they are entitled under federal law, they seek for the alleged violation of the Georgia Constitution. Therefore, the Court construes this claim as relating solely to the claim for declaratory and injunctive relief and not to the Plaintiffs' claim for damages. Because genuine issues of fact exist as to whether the Defendants have violated the Equal Protection Clause, the Court concludes that the Defendants are not entitled to summary judgment as a matter of law as to the state equal protection claim. The Defendants' summary judgment motion as to Count IV is therefore denied.

E. O.C.G.A. § 48-5-220

In Count V of the Second Amended Complaint, the Plaintiffs assert that the Defendants impermissibly committed acts in violation of O.C.G.A. § 48-5-220 to give tax money to persons for no reason other than their race. The Defendants contend that the Plaintiffs have no cause of action under O.C.G.A. § 48-5-220 because that statute does not provide either a basis for the Plaintiffs' claim or a private right of

action in general. The statute provides that "[c]ounty taxes may be levied and collected for the following public purposes . . ." and lists 22 purposes for which taxes may be levied and collected. O.C.G.A. § 48-5-220. The Court concludes that the Defendants are entitled to summary judgment on this count because (1) the statute does not prohibit or otherwise proscribe the conduct of which the Plaintiffs complain; and (2) the Plaintiffs have not cited and this Court has not found any specific authority that allows a private right of action in cases such as the instant one where the statutory scheme does not provide for one. *See Cellular One, Inc. v. Emanuel County*, 227 Ga. App. 197, 199-200, 489 S.E.2d 50, 52-53 (1997) (finding no private cause of action for an alleged violation of tax revenue regulations where none was provided for in the statute).

F. O.C.G.A. § 36-11-1

The Defendants contend that the Plaintiffs' claims against Fulton County are barred by O.C.G.A. § 36-11-1 because the Plaintiffs failed to provide the County with written notice of their claims within the specified 12-month period. This statute provides that:

> [a]ll claims against counties must be presented within 12 months after they accrue or become payable or the same are barred, provided that minors or other persons laboring under disabilities shall be allowed 12 months after the removal of the disability to present their claims.

O.C.G.A. § 36-11-1. The Court concludes that this statute does not apply to bar any of the Plaintiffs' federal and state constitutional claims contained in Counts I, II, III and IV. *See Terrell County v. Albany/Dougherty Hosp. Authority*, 256 Ga.

627, 630, 352 S.E.2d 378, 381 (1987) (the statute applies to claims arising from contract); *Norris v. Nixon*, 78 Ga. App. 769, 774, 52 S.E.2d 529, 532 (1949) (the claims intended to be barred by the statute reference claims growing out of contract or breach of duty).

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment [Doc. No. 103] is DENIED. The Defendants' Motion for Summary Judgment [Doc. No. 105] is GRANTED in part and DENIED in part. The Defendants' summary judgment motion is granted as to the claims of Plaintiff Goff. The Defendants' summary judgment motion is granted with respect to Counts V and VI and these claims are DISMISSED from this case. The Defendants Skandalakis, Hightower, Boxill, Darnell, Joyner, Lowe and Fulton are entitled to absolute and qualified immunity as to the claims against them in their individual capacities. The Court has jurisdiction as to Fulton County as an entity and there is no reason for the Board member Defendants to continue in this case solely in their official capacities. Therefore, the Defendants' summary judgment motion is granted as to Defendants Skandalakis, Hightower, Boxill, Darnell, Joyner, Lowe and Fulton. The Defendants' summary judgment motion is denied in all other respects as to Defendants Fulton County and Cooper. The Defendants' Motion to Strike the Affidavit of Thomas Bruns [Doc. No. 119] is DENIED. Pursuant to Rule 42(b), the Court will conduct a separate bench trial upon the Plaintiffs' claim that the 1994 Fulton County MFBE Program is unconstitutional. This bench trial

will be scheduled as soon as possible after the Court rules upon the Motion to Certify a Class. A separate jury trial on Plaintiffs' damage claims will follow.

SO ORDERED.

Appendix D

United States District Court,
N.D. Georgia,
Atlanta Division.

WEBSTER GREENTHUMB CO., Plaintiff,
v.
FULTON COUNTY, GEORGIA, Defendant.

No. Civ.A. 1:96CV2399-TWT.

Sept. 18, 2000.

ORDER

THRASH, District Judge.

This is a race and sex discrimination action brought pursuant to 42 U.S.C. §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment. It is before the Court on Plaintiff's Motion for Attorneys' Fees or, in the Alternative, Plaintiff's Motion for Interim Award of Attorneys' Fees [Docs. 182 & 191], Plaintiff's Bills of Costs [Docs. 185 & 309], and Plaintiff's Supplemental Motion for Attorneys' Fees [Doc. 312]. Plaintiff seeks $1,544,222.10 in fees plus costs. For the reasons set forth below, Plaintiff's motions for attorneys' fees are granted, as modified by the Court, in the amount of $1,089,610.45, and the Bills of Costs already taxed by the Court to Defendant is affirmed, as modified, in the amount of $15,997.64.

I. BACKGROUND

Plaintiff Webster Green Thumb Company ("Webster Green Thumb") is a Georgia corporation with its principal place of business in Newnan, Georgia. It is engaged in the business of landscaping and tree removal. Defendant Fulton County ("Fulton County") is a political subdivision of the State of Georgia. Webster Green Thumb and Fulton County are the only parties that remain at this stage of the litigation. All other parties have been dismissed. Accordingly, Webster Green Thumb seeks recovery of its attorneys' fees from Fulton County alone.

In this action, the Plaintiff successfully challenged Fulton County's 1994 Minority and Female Business Enterprise ("MFBE") program. The facts of this case are stated in detail at 44 F. Supp. 2d 1359, 1363-71 (N.D. Ga. 1999), and 51 F. Supp. 2d 1354, 1356-61 (N.D. Ga. 1999), and are not recited here except to the extent they specifically affect issues relating to the Court's award of attorneys' fees. Plaintiff filed suit in this Court on September 17, 1996. The Complaint was amended twice, first on January 10, 1997, and again on February 4, 1998. The purpose of the First Amended Complaint was to add Willie F. Hill, Kelly Goff, Marjorie Simpson and Minority Distributing Corp. as Plaintiffs. All these additional Plaintiffs, however, were ultimately dismissed by the Court either in its December 9, 1998, Order or its February 12, 1999, Summary Judgment Order. At the time of the Court's February 12, 1999, Summary Judgment Order, the named Plaintiffs were Daniel Webster, Peggy Webster, Kelly Goff and Webster Green Thumb. The Defendants at that time consisted of (1) Fulton County, (2) the six individual members of the Fulton County Board of Commissioners at the time (Mitch Skandalakis, Nancy

Boxill, Emma Darnell, Michael Hightower, Gordon Joyner and Tom Lowe), and (3) Michael Cooper, Director of Fulton County's Department of Contract Compliance and Equal Employment Opportunity during the time relevant to this case.

The Second Amended Complaint asserted six claims for relief. Plaintiffs asserted in Count I that Defendants unlawfully discriminated against Plaintiffs on the grounds of race and sex in violation of 42 U.S.C. § 1981 and the Fourteenth Amendment's Equal Protection Clause, as enforced by 42 U.S.C. § 1983. In Counts II and III, Plaintiffs asserted that Defendant Fulton County discriminated against the putative class of Plaintiffs by engaging in a policy, pattern, or practice of discriminating on the basis of race and sex in awarding contracts for goods and services. In Count IV, Plaintiffs asserted that Defendants violated the Equal Protection Clause of the Constitution of the State of Georgia, Art. 1, § 1, ¶ 2. In Count V, Plaintiffs asserted that the Defendants impermissibly violated O.C.G.A. § 48-5-220 by providing tax money to persons for no reason other than their race. Finally, in Count VI, Plaintiffs asserted a retaliation claim pursuant to Section 1981 and the Equal Protection Clause. In asserting these claims, Plaintiffs sought declaratory, injunctive, and monetary relief.

Following discovery, Plaintiffs and Defendants filed motions for summary judgment. The Court entered an Order on February 12, 1999, denying Plaintiffs' Motion for Summary Judgment and granting in part and denying in part Defendants' Motion for Summary Judgment. Defendants' summary judgment motion was granted as to all claims asserted on behalf of Plaintiff Kelly Goff because he lacked standing to sue. The Court also dismissed the state law-based

claims in Counts V and VI of the Second Amended Complaint entirely. The Court found that Defendants Skandalakis, Boxill, Darnell, Hightower, Joyner and Lowe were entitled to absolute and qualified immunity as to the claims asserted against them in their individual capacities. Furthermore, the Court concluded that there was no reason to continue the case against them in their official capacities since Fulton County was already a party over which the Court had jurisdiction. Consequently, Defendants' Motion for Summary Judgment was granted on all claims as to Defendants Skandalakis, Boxill, Darnell, Hightower, Joyner and Lowe. Defendants' Motion for Summary Judgment was denied in all other respects as to Defendants Fulton County and Cooper.

The Court stated in its February 12, 1999, Summary Judgment Order that it would first conduct a bench trial regarding the 1994 MFBE program's constitutionality. A separate jury trial on Plaintiffs' claim for monetary damages would follow. The bench trial was conducted over six days beginning May 11, 1999. The Court then recessed for two days prior to closing arguments to review the voluminous documentary evidence introduced at trial. Closing arguments were held on May 24, 1999. The Court spent three weeks working on its findings of facts and conclusions of law. The Court, in an Order entered June 11, 1999, struck down the Fulton County MFBE program as an unconstitutional violation of the Equal Protection Clause. The Court explained its decision, as noted in its Conclusion to the June 11, 1999, Order by stating:

> In summary, Fulton County has operated a minority and female preference program for most of the past two decades. The program has been good for economic

development in the minority business community. Historically, minorities have been the victims of pervasive discrimination in all facets of economic enterprise. As a matter of good public policy, this alone might justify minority set aside programs by public agencies. Nonetheless, the Supreme Court has held that such programs involving racial or ethnic preferences must be subjected to strict scrutiny. Applying the high standards set by the Supreme Court and the Eleventh Circuit, the Fulton County 1994 MFBE Program cannot survive strict scrutiny with respect to the evidentiary foundation for such a program or narrow tailoring to meet a compelling governmental interest. There is no evidence that the Fulton County Government has significantly or systematically discriminated against African-American or other minority businesses in the decades of the 1980s and 1990s. There is insufficient evidence that it has become a passive participant in a pervasive system of discrimination in the private sector and that racial and ethnic preferences have been adopted as a last resort to eliminate that discrimination. The program itself does nothing to remedy discrimination in private sector contracting. The goals set by the program are not based upon any realistic assessment of the availability of minority business enterprises in the Atlanta metropolitan marketplace. Likewise, Fulton County has not produced sufficient probative evidence of discrimination against female business enterprises to justify a gender preference program. Therefore, race, ethnic and gender balancing in Fulton County contracting must end.

Webster v. Fulton County, 51 F. Supp. 2d 1354, 1383 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000). Final judgment on the claim for declaratory and equitable relief was entered in favor of Plaintiff Webster Green Thumb.

Plaintiffs on June 24, 1999, filed their first motion requesting attorneys' fees for work done on the case up to that point and provided the Court a supporting itemization of their fees on July 23, 1999. After careful consideration, the Court chose to defer all attorneys' fees issues until conclusion of the entire case.

A jury trial on damages was held beginning February 14, 2000. At the conclusion of the trial, the jury returned a verdict in favor of Plaintiff against Fulton County for $8,750 in compensatory damages as lost profits. The jury also awarded Plaintiff $1.00 in nominal damages against Michael Cooper. The jury, however, rejected Plaintiff's claim for $1 million in punitive damages against Cooper. After the jury was dismissed, the Court sustained Cooper's defense of qualified immunity based upon the jury's factual findings and dismissed the action against him. Judgment was entered in favor of the Plaintiff against Fulton County. Plaintiff as the prevailing party in this case now seeks an award of attorneys' fees from Fulton County. Both parties have fully briefed the Court on the fee petition. In addition, the Court conducted a day-long evidentiary hearing on July 3, 2000, to assist it in rendering a reasonable award. Additional submissions were made after the hearing.

II. DISCUSSION

The award of attorneys' fees in this action is governed by the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, as amended. That act provides as follows:

> In any action or proceeding to enforce a provision of section 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et*

> *seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b). This statute is interpreted broadly since it is remedial in nature and facilitates private enforcement of civil rights. *Williams v. City of Fairburn*, 702 F.2d 973, 976 (11th Cir. 1983). Although awarding attorneys' fees is within the discretion of the trial court, such discretion is a narrow one in that attorneys' fees should be denied only when special circumstances would render an award unjust, *Solomon v. City of Gainesville*, 796 F.2d 1464, 1466 (11th Cir. 1986), or the statute is being subverted into a ruse for providing "windfalls" to attorneys. *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983). Importantly, one need not succeed on all claims in order to obtain attorneys' fees. *Id.* With these general principles in mind, the Court now turns to the particulars of Plaintiff's request for attorneys' fees and Fulton County's contentions why the requested fees should not be fully awarded in this case.

A. PREVAILING PARTY STATUS

Fulton County contends that Plaintiff should not be entitled to recover any attorneys' fees for work relating to the bench trial, at which Plaintiff sought declaratory and injunctive relief. Fulton County contends that Plaintiff was not a "prevailing party" at the bench trial. Section 1988 by its terms limits eligibility for attorneys' fees to a "prevailing party." 42 U.S.C. § 1988(b). A party is not a prevailing party if it only "conceivably could benefit" from the court's

judgment. *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1278 (11th Cir. 1999). There must exist evidence that the court's judgment "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (quoted in *Barnes*, 190 F.3d at 1278). Thus, a party that succeeds on the merits nonetheless is not a prevailing party for the purpose of attorneys' fees if it does not directly benefit from the court's order at the time it is rendered. *See Hewitt v. Helms*, 482 U.S. 755, 763-64, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987) (noting that plaintiff was not prevailing party because he did not directly benefit from final judgment at the time it was entered).

The analysis begins with the United States Supreme Court's decisions in *Hewitt v. Helms*, 482 U.S. 755, 762, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987), and *Rhodes v. Stewart*, 488 U.S. 1, 4, 109 S. Ct. 202, 102 L. Ed. 2d 1 (1988), two cases where the Supreme Court held that the litigants were not prevailing parties for the purpose of attorneys' fees. In *Hewitt*, a prisoner successfully argued that his administrative segregation and subsequent conviction for participating in a prison riot violated his due process rights. The Supreme Court noted that during the pendency of the lawsuit the plaintiff had been released from prison. The Court held that he, therefore, was not a prevailing party for the purpose of attorneys' fees because the vindication of his constitutional rights was merely a "moral satisfaction." *Hewitt*, 482 U.S. at 762, 107 S. Ct. 2672. Even though the plaintiff was subsequently returned to prison, and thus ultimately may have benefitted from his victory in the Section 1983 case, the Court said "that fortuity can hardly render him, retroactively, a 'prevailing party' . . . ." *Id.* at 763-64, 107 S. Ct. 2672. In

Rhodes, two prisoners successfully challenged a prison's magazine subscription policy as a violation of their procedural and substantive due process rights. The plaintiffs, nevertheless, were not entitled to attorneys' fees because the policy modification caused by the suit could not have benefitted either of the two plaintiffs, one of whom had been released before the district court entered its order and the other of whom had died. *Rhodes*, 488 U.S. at 4, 109 S. Ct. 202.

In this case, Fulton County contends that Plaintiff has not directly benefitted from the injunction the Court issued and, therefore, should not recover attorneys' fees for work relating to its prayer for declaratory and injunctive relief. To support this argument, Fulton County relies on the Eleventh Circuit Court of Appeals' recent decision in *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1278 (11th Cir. 1999). In that case, the Eleventh Circuit held that a job applicant was not a prevailing party for the purpose of attorneys' fees even though he obtained an injunction that permanently enjoined Broward County, Florida, from continuing certain preemployment psychological testing. The district court held that such testing violated the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* *Broward County*, 190 F.3d at 1278. The Eleventh Circuit stated that while it was conceivable that the plaintiff could benefit from the injunction if he ever reapplied to Broward County for a job, the plaintiff had presented no evidence that he planned to reapply and, thus, did not directly benefit from the injunction. *Id.* The Eleventh Circuit, however, specifically noted in a footnote that it was not foreclosing the possibility that a successful litigant could recover attorneys' fees if he "establishes that he continues to have *or is reasonably likely to have* some legal relationship to the defendant." *Id.* at 1278

n.3 (emphasis added). It simply found no evidence that Barnes was eligible to reapply for the deputy position or that he intended to reapply once the court barred continued use of the psychological examinations. *Id.*

Although it followed the *Hewitt* and *Rhodes* holdings in *Broward County*, the Eleventh Circuit expressly recognized that cases in the employment context may be distinguishable from these prisoner cases if the plaintiff can show that he remains eligible for the position he sought and is likely to reapply after successfully challenging the employment practice. *See Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1278 n.3 (11th Cir. 1999) ("In an employment case, however, it may be possible to allege and show – without requiring any speculation by the court – that the plaintiff retains a sufficient connection to the defendant that he likely will be affected by the court's judgment."). The case presently before this Court is distinguishable from *Hewitt, Rhode* and *Broward County* on just such grounds, as well as a number of others. This case is much closer to the employment context referenced in the *Broward County* footnote than the prisoner context that *Hewitt* and *Rhodes* represent or the actual situation in *Broward County*. Plaintiff was seeking work from Fulton County on a contractual basis. Unlike the plaintiff in *Broward County*, Plaintiff in this case presented evidence throughout the litigation that it remains in the tree removal business, would like to obtain contracts with Fulton County, and is reasonably likely to reapply for County contracts in the future. Plaintiff will directly benefit from this Court's decision in all future bids it submits to Fulton County. Its ability to avail itself to the benefits of the injunction is not dependent on mere "fortuity," as the Supreme Court has said exists when an ex-convict commits

another crime, is arrested and convicted, and just happens to be reincarcerated in the very same prison or system as before.

In addition, Plaintiff's success in obtaining declaratory and injunctive relief cannot be termed mere "moral satisfaction." Fulton County alleges that the MFBE program would have been up for renewal only three months after this Court issued the injunction, notes that Plaintiff did not have any pending bids with the County, and implies that the MFBE program was going to be allowed to lapse without renewal. Based on these allegations, Fulton County contends that the allegedly soon-to-be-non-existent MFBE program could no longer have harmed Plaintiff and this Court's injunction, therefore, could not have benefitted Plaintiff. The Court cannot accept this characterization of the evidence. Despite Fulton County's contentions to the contrary, evidence exists that Fulton County would not have allowed its MFBE program to lapse three months after this Court issued the injunction and instead would have renewed a program that has directly harmed Plaintiff's chances of obtaining County business. Indeed, if Fulton County really had planned to dismantle the MFBE program on its own accord within the three months immediately following issuance of the injunction, there would have been little reason for the County to request, as it did, a stay of the injunction until after the Eleventh Circuit decided the case on appeal. Certainly, if the County did not intend to renew the MFBE program, it would not have wasted the taxpayers' money appealing the Order abolishing it.

Finally, even if this Court somehow held that Plaintiff has not directly benefitted from the declaratory and injunctive relief – either because Plaintiff is not likely to submit bids to the County in the future or because Fulton County would have allowed the MFBE program to expire – Plaintiff still

would not lose his status as prevailing party for the work done relating to the prayer for declaratory and injunctive relief. That is because Plaintiff was also seeking monetary damages and was awarded them at the jury trial. The issues that surround the prayers for declaratory and injunctive relief are intertwined with Plaintiff's claims for monetary damages. Plaintiff's success on the damages claims depended greatly on the Court's judgment of the constitutional issues involved in this case. Declaratory and injunctive relief were necessary steps for Plaintiff to achieve monetary relief for damages it incurred. To obtain monetary damages, Plaintiff needed to show that Fulton County's MFBE program was unconstitutional.

The interrelationship of all the issues in this case would be obvious if the case had been tried in one proceeding. Unlike in *Broward County* where the plaintiff obtained only injunctive relief and failed on all damage claims, Plaintiff in this case won at both the bench and jury trials. This Court, therefore, must take into account the interrelationship of Plaintiff's different prayers for relief. In contrast, there was no reason for the Eleventh Circuit to do so in *Broward County* because the district court dismissed the plaintiff's claims for monetary damages. As the Supreme Court held in *Farrar v. Hobby*, 506 U.S. 103, 113, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992), any time a plaintiff wins even nominal damages for a civil rights violation, he becomes a prevailing party pursuant to § 1988 since "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* Plaintiff has thus met the statutory threshold for obtaining attorneys' fees. *See Texas State Teachers Assoc. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789, 109 S. Ct.

1486, 103 L. Ed. 2d 866 (1989) ("At the outset we noted [in *Hensley v. Eckerhart*, 461 U.S. 424, 431, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)] that no fee award is permissible until the plaintiff has crossed the 'statutory threshold of prevailing party status.'"). With that threshold met, this Court now turns to the task of calculating a reasonable award of attorneys' fees.

B. REASONABLE AWARD OF ATTORNEYS' FEES

Plaintiff seeks a total attorneys' fee award of $1,544,222.10. This total requested amount represents $1,051,235.00 for 5,292.6 hours of work conducted up through the bench trial on declaratory and injunctive relief, an additional $209,627.50 for 869.0 hours of work related to the jury trial on damages, $27,307.50 for 99.3 hours of work related to the attorneys' fee petition since the March 10, 2000, supplemental filing following the jury trial, a 15% enhancement for exceptional results obtained, and $62,826.60 in expenses. Fulton County responds that this Court should drastically reduce Plaintiff's request for attorneys' fees on grounds that many of the claims asserted were ultimately unsuccessful, that Plaintiff is not entitled to an enhancement, and that Plaintiff's lodestar amount should be reduced on grounds that Plaintiff obtained minimal results.

In *Hensley v. Eckerhart*, 461 U.S. 424, 433-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), and *Blum v. Stenson*, 465 U.S. 886, 896-97, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984), the United States Supreme Court established the framework and methodology for calculating the amount of a reasonable attorneys' fee award to a prevailing party pursuant to 42 U.S.C. § 1988. The starting point for calculating reasonable attorneys' fees is "the number of hours reasonably expended

on the litigation multiplied by a reasonable hourly rate" for the attorneys' services. *Hensley*, 461 U.S. at 433, 103 S. Ct. 1933; *Blum*, 465 U.S. at 897, 104 S. Ct. 1541; *accord ACLU of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999). The product of these two numbers is commonly termed the base figure, or the "lodestar." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 563, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986). After calculating the lodestar, the court may within its discretion adjust the amount upwards or downwards based on a number of factors, such as the quality of the results obtained and the legal representation provided. *Blum*, 465 U.S. at 897, 104 S. Ct. 1541; *Duckworth v. Whisenant*, 97 F.3d 1393, 1396 (11th Cir. 1996).

The fee applicant is the party that "bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates." *Barnes*, 168 F.3d at 427 (*quoting Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1304 (11th Cir. 1988)); *accord Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co.*, 207 F.3d 1247, 1252 (11th Cir. 2000). That burden includes:

> supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate. Further, fee counsel should have maintained records to show the time spent on the different claims, and the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity. . . . A well-prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case.

Barnes, 168 F.3d at 427 (citations omitted). These obligations of the fee applicant are especially important in cases where the applicant has only partially succeeded in the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

Similarly, those parties opposing fee applications also have obligations. Their objections and proof concerning hours they want excluded must be specific and "reasonably precise." *Id.* at 428, 103 S. Ct. 1933. When the parties fulfill their respective obligations, this assists the court in fulfilling its duty to render an order that articulates both its decisions and reasons for the decisions, thus allowing for meaningful appellate review. *Id.* at 428-29, 103 S. Ct. 1933; *see also Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co.*, 207 F.3d 1247, 1252 (11th Cir. 2000) ("[W]e have said that a court's order on attorneys' fees must allow meaningful appellate review."); *NAACP v. City of Evergreen*, 812 F.2d 1332, 1335 (11th Cir. 1987) ("A prerequisite for our review of an attorney's fee award is that the district court's opinion must have explained the reasons for the award with 'sufficient clarity to enable an appellate court to intelligently review the award.'").

1. THE "LODESTAR"

a. REASONABLE HOURS

"[A]ll reasonable expenses and hours incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under § 1988," Barnes, 168 F.3d at 427 (11th Cir. 1999) (*quoting Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983)), but "[c]ounsel for the prevailing party should make a good faith

effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary" because, for example, the case is overstaffed. *Hensley*, 461 U.S. at 434, 103 S. Ct. 1933. Work performed by multiple attorneys, however, is not subject to reduction where the attorneys were not unreasonably doing the same work. *Jones v. Central Soya Co.*, 748 F.2d 586, 594 (11th Cir. 1984); *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983). As to the work performed, compensable activities include pre-litigation services in preparation of filing the lawsuit, background research and reading in complex cases, productive attorney discussions and strategy sessions, negotiations, routine activities such as making telephone calls and reading mail related to the case, monitoring and enforcing the favorable judgment, and even preparing and litigating the request for attorneys' fees. *See City of Riverside v. Rivera*, 477 U.S. 561, 573 n.6, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) (allowing compensation for productive attorney discussions and strategy conferences); *Webb v. Board of Ed.*, 471 U.S. 234, 243, 105 S. Ct. 1923, 85 L. Ed. 2d 233 (1985) (allowing compensation for pre-litigation services in preparation of suit); *Cruz v. Hauck*, 762 F.2d 1230, 1233-34 (5th Cir. 1985) (allowing compensation for preparing and litigating fee request); *Adams v. Mathis*, 752 F.2d 553, 554 (11th Cir. 1985) (holding that measures to enforce judgment are compensable); *New York State Assoc. for Retarded Children v. Carey*, 711 F.2d 1136, 1146 & n.5 (2d Cir. 1983) (allowing compensation for background research and reading in complex cases); *Brewster v. Dukakis*, 544 F. Supp. 1069, 1079 (D. Mass. 1982) (compensating for negotiation sessions), *aff'd as modified*, 786 F.2d 16, 21 (1st Cir. 1986); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296, 1321, 1348 (E.D.N.Y. 1985) (compensating routine activities such as telephone calls or reading mail that

contribute to the litigation). Reasonable travel time of the prevailing party's attorneys ordinarily is compensated on an hourly basis, although the rate may be reduced if no legal work was performed during travel. *University College*, 706 F.2d at 1208. As with attorneys' work, the hours expended by paralegals, law clerks, and other paraprofessionals are also compensable to the extent these individuals are engaged in work traditionally performed by an attorney. *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988). In short, "with the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988," and "the standard of reasonableness is to be given a liberal interpretation." *NAACP v. City of Evergreen*, 812 F.2d 1332, 1337 (11th Cir. 1987) (*quoting Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983)).

The Eleventh Circuit has stated that its decisions regarding attorneys' fees "contemplate a task-by-task examination of the hours billed" and that applicants should "show the time spent on the different claims." *ACLU of Ga. v. Barnes*, 168 F.3d 423, 427, 429 (11th Cir. 1999). The Eleventh Circuit has also stated that where a fee application and supporting documents are voluminous, a district court is not required to engage in an hour-by-hour analysis of the fee award. *Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994). In such cases, it is sufficient for the district court to determine the total number of hours devoted to the litigation and then reduce that figure in gross with an across-the-board percentage reduction if such a reduction is warranted. *Id.* The Eleventh Circuit has even intimated that such a method

may be the preferred course with a voluminous fee request to avoid waste of judicial resources. *Id.* Thus, the Eleventh Circuit has provided its district courts with two avenues for determining a fee award in cases where the request is voluminous: (1) a district court may attempt to reduce the hours on a task-by-task basis, or (2) the court may simply add up the total number of hours expended and then reduce that amount on a percentage basis, if reduction is warranted. Both of these two alternative methods comport with Supreme Court precedent. The Supreme Court has stated:

> The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The Court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Hensley v. Eckerhart, 461 U.S. 424, 436-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); *accord Popham v. City of Kennesaw*, 820 F.2d 1570, 1579-81 (11th Cir. 1987) ("[T]he Supreme Court explicitly stated that a court could simply reduce the award to account for the plaintiff's limited success instead of eliminating hours specifically expended on unsuccessful claims.").

This case certainly meets the requirements for a voluminous fee request. Furthermore, Fulton County's objections are themselves quite voluminous. Indeed, in *Loranger*, the case in which the Eleventh Circuit adopted the percentage-reduction method, the amount of the fee request was less than exists here. The Court has given considerable thought to employing the *Loranger* method of computing fees because of the already enormous expenditure of judicial resources

which this case represents. In the end, however, this Court has chosen to engage in an hour-by-hour analysis of the fee award. It has done so for three reasons. First, this case involves numerous different claims – some of which were successful, some of which were unsuccessful, some of which are discrete, and some of which are interrelated. Even if the Court chose to reduce the award on a percentage basis, it still would have to analyze the relationship of the claims to determine the proper percentage by which to reduce the award. Indeed, it might have had to spend as much time as it has doing an hour-by-hour analysis. Second, any such percentage reduction would necessarily be somewhat more arbitrary than a by-the-hours analysis. Third, Plaintiff's counsel has provided the Court with very detailed summary breakdowns for each part of the case to assist the Court in calculating the total hours expended on each task. Furthermore, Defendants have provided their own summaries stating exactly which specific tasks and hours they are challenging. The Court has relied on both parties summaries extensively in calculating the fee award.

The Court's reference to these summaries, however, has not prevented the Court from conducting its own hour-by-hour analysis of the fee request. The summaries merely have aided the Court in fulfilling its duty. Additionally, the Court notes that both parties were given ample opportunity to question each other on these summaries and all other related documents at an all-day evidentiary hearing on July 3, 2000. Both parties did so and, in so doing, provided greater focus to the fee issues before the Court. Significantly, with a couple of minor exceptions that will be noted, Fulton County does not in any way place in issue the veracity of Plaintiff's counsel with respect to the time recorded on their time records.

A computation of the hours reasonably expended should not include time spent on "discrete and unsuccessful" claims, *Duckworth v. Whisenant*, 97 F.3d 1393, 1397 (11th Cir. 1996), but should include time spent on all claims that arise out of the same course of conduct and share a "common core of fact," even if a specific individual claim did not succeed. *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991); *Jean v. Nelson*, 863 F.2d 759, 771 (11th Cir. 1988); *Popham v. City of Kennesaw*, 820 F.2d 1570, 1578 (11th Cir. 1987); *Military Circle Pet Ctr. No. 94 v. Cobb County*, 734 F. Supp. 502, 504 (N.D. Ga. 1990). In determining whether claims are related by a common core of fact, the Eleventh Circuit has taken an expansive view. *See Popham*, 820 F.2d at 1579 ("Because plaintiff's counsel is required to 'explore every aspect of the case, develop all the evidence and present it to the court,' courts have expansively treated claims as being related.") (citations omitted). A court also should not discount an attorneys' fee award based on the court's rejection of an alternative legal ground, when one of the grounds is accepted. As the Supreme Court has stated:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.

Hensley v. Eckerhart, 461 U.S. 424, 441, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

Where entries specify activities that were directed towards both a successful claim and a "discrete and unsuccessful" claim, the allocation of reasonable hours can become quite complicated. In such instances, the Court in this case has followed Judge Forrester's example in *Duckworth v. Whisenant*, No. 1:89-CV-1102-JOF (N.D. Ga. Jan. 31, 1995), *aff'd*, 97 F.3d 1393, 1397 (11th Cir. 1996), not to exclude the entire combined entry, but instead to attempt an apportionment of each activity in an evenhanded manner. *See Duckworth*, 97 F.3d at 1397 (affirming Judge Forrester's award of attorneys' fees and wholly incorporating his order as the appellate decision). As the Eleventh Circuit has explained, where all the theories of recovery arise from a common core of facts, a district court should focus on "the significance of the overall results as a function of total reasonable hours," and reducing the lodestar based on a simple ratio of successful issues to issues raised is improper. *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988). With these principles in mind, the Court now turns to the specific hours Plaintiff has requested in its requests for attorneys' fees to determine their reasonableness.

Because the Eleventh Circuit has stated that its decisions regarding attorneys' fees "contemplate a task-by-task examination of the hours billed," *ACLU of Ga. v. Barnes*, 168 F.3d 423, 427, 429 (11th Cir. 1999), this Court has divided Plaintiff's attorneys' fee request based on stages of litigation, just as the Eleventh Circuit did in *Barnes*. The Court looks first at the hours expended on the complaint and accompanying mandatory disclosures filed in this case. The Court then reviews, in the following order, time spent on issues related to class certification, Plaintiff's activities related to depositions, Plaintiff's document production and

analysis, Plaintiff's written discovery, Plaintiff's other investigation and background research, Plaintiff's involvement with its own and Fulton County's expert reports, motions filed with the court related to discovery, the parties' motions for summary judgment, pre-trial motions for the bench and jury trials, hours expended in preparation for and attendance at the bench and jury trials, time spent on miscellaneous correspondence and conferences, preparation of the fee requests, taxable costs and non-taxable expenses.

i. COMPLAINT AND MANDATORY DISCLOSURES

Plaintiff in this case filed the original Complaint, a First Amended Complaint, and a Second Amended Complaint. For all three pleadings and the accompanying mandatory disclosures that must be filed with the Court, Plaintiff requests fees for 69.4 hours of work. According to Plaintiff, work on the Complaint, Amended Complaints and Mandatory Disclosures is divided as follows: Attorney Mason Barge – 19.7 hours; Attorney Patrick McKee – 41.8 hours; associate attorney Deborah Barrow – 2.5 hours; associate attorney Holli Hidden – 4.1 hours; and associate attorney Susan Rickertsen – 1.3 hours. Fulton County contends that the Court should reduce the requested fee award for those portions of the complaints and mandatory disclosures that are attributable to unsuccessful Plaintiffs and successful Defendants in this case.

Plaintiffs Marjorie Simpson, Willie F. Hill and Minority Distributing Company were dismissed by the Court on December 9, 1998. Plaintiff Kelly Goff was dismissed by the Court in its February 12, 1999, Summary Judgment Order for lack of standing. Plaintiffs Daniel and Peggy Webster's equitable claims were dismissed following the bench trial for

lack of standing. Ultimately, they were dismissed from the case entirely because they lacked standing on their damages claims also. Thus, of the original seven Plaintiffs in this case, only one, Webster Green Thumb, remained a party throughout the entire case and ultimately succeeded.

Defendants Mitch Skandalakis, Nancy Boxill, Emma Darnell, Michael Hightower, Gordon Joyner and Tom Lowe, all of whom were members of the Fulton County Board of Commissioners at the time this case was filed, were dismissed in the Court's February 12, 1999, Summary Judgment Order. As to claims asserted against them in their individual capacities, the Court held that the commissioners were entitled to absolute and qualified immunity. As to claims asserted against them in their official capacities, the Court held that there was no reason to continue the case against the commissioners since Fulton County remained a party to the case. The Court dismissed all claims against Defendant Andrew Jenkins of the County's Department of Public Works in its December 9, 1998, Order. Defendant Michael Cooper, Director of Fulton County's Department of Contract Compliance and Equal Employment Opportunity during the time relevant to this case, remained a party throughout the entire course of the lawsuit until he was dismissed after the jury trial. Thus, only two of the original Defendants in this case remained throughout the case, and Plaintiff Webster Green Thumb is a prevailing party against only one of them, Fulton County.

Fulton County, therefore, contends that the Court should reduce the time that Plaintiff's counsel spent drafting the Complaint and Amended Complaint in this case by 60% to reflect that almost all of the Plaintiffs and Defendants in this action ultimately were dismissed. Although Fulton County is

correct that all but one of the Plaintiffs in this case was dismissed and that Plaintiff succeeded in its claims against only one of the Defendants, that fact alone does not mandate that the Court reduce the attorneys' fee award for time spent on activities that relate to the dismissed Plaintiffs or Defendants. This is especially true with regard to the Complaint. As discussed above, a fee petition should not be reduced where claims arise out of the same course of conduct and share "a common core of fact," *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), and the Eleventh Circuit has taken an expansive view of the issue. *Popham v. City of Kennesaw*, 820 F.2d 1570, 1578 (11th Cir. 1987). In this case, it is clear that all the claims asserted by all the Plaintiffs against all the Defendants arise out of the same course of conduct and share a common core of fact. Indeed, the claims all share an identical core of fact. Even if only one Plaintiff, Webster Green Thumb, had sued only one Defendant, Fulton County, the original Complaint and the Second Amended Complaint still would have been almost identical to those actually filed. The only difference would have been that some of the parties named in the complaints would not have been included. Plaintiff, therefore, is entitled to recover attorneys' fees for the time spent on the original Complaint and the Second Amended Complaint.

It is also true, however, that a computation of hours reasonably expended should not include time spent on discrete and unsuccessful claims. *Duckworth v. Whisenant*, 97 F.3d 1393, 1397 (11th Cir. 1996). The First Amended Complaint added discrete and unsuccessful claims. The overriding purpose of the First Amended Complaint was to add Willie F. Hill, Kelly Goff, Marjorie Simpson and Minority Distributing Corp. as Plaintiffs, and Andrew Jenkins as a Defendant. As explained above, all these Plaintiffs were

dismissed by the Court, as were all claims against Defendant Jenkins. Accordingly, the Court should reduce the attorneys' fee award for all of the hours spent on this First Amended Complaint. Mr. Barge himself admitted, both in a brief and at the evidentiary hearing, that time spent on the First Amended Complaint may not be compensable and that he did not include his own hours spent on this task in the attorneys' fees petition. *See* Plaintiff's Reply in Support of Plaintiff's Supplemental Motion for Award of Attorneys' Fees and Expenses of Litigation, at 5 [Doc. 338]. Plaintiffs' records, however, do include 12.0 hours that Patrick McKee spent on January 3 and 4, 1997, on the Motion to Amend the Complaint and the First Amended Complaint. Accordingly, 12.0 hours should be excluded from compensable time that Patrick McKee spent on the task of "Complaints and Mandatory Disclosures." Otherwise, all hours in this category are compensable. Given the factual complexity of this case, the Court concludes that 57.4 hours spent on the Complaint and Second Amended Complaint in this case is not excessive. *See, e.g., Barnes*, 168 F.3d at 432 (compensating 40 of 147.88 hours requested for a much simpler complaint where only 14% of the paragraphs were not derived from already existing sources).

ii. CLASS ACTION ISSUES

Plaintiff requests fees for 324.0 hours related to its unsuccessful attempt to obtain class certification and its Motion to Contact Class Members. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 129.2 hours; Patrick McKee – 36.1 hours; Deborah Barrow – 82.7 hours; Holli Hidden – 20.8 hours; and Susan Rickertsen – 55.2 hours. Fulton County contends that all time spent on class issues is noncompensable because

Plaintiff did not succeed on any of its motions in this category and the Court refused to certify this case as a class action. After careful consideration of the matter, the Court agrees with Fulton County. Given Eleventh Circuit case law, the effort to obtain class certification under Rule 23(b)(3) was probably doomed from the start. *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004-07 (11th Cir. 1997). As discussed immediately above, time spent on dismissed Plaintiffs should be excluded from a fee award if the result is discrete and unsuccessful. *Duckworth*, 97 F.3d at 1397. The Court views the motions pertaining to class certification and contacting potential class members as akin to the dismissed Plaintiffs issue. The Court's refusal to certify the class is in effect no different that the Court's dismissal of Plaintiffs Simpson, Hill, Goff, Daniel and Peggy Webster, and Minority Distributing Corp. Both the dismissed Plaintiffs and the prospective class were not entitled to participate in the lawsuit. Since time spent on discrete and unsuccessful issues of the dismissed Plaintiffs is not compensable, neither should this Court include in the fee award time spent on unsuccessful attempts to add new plaintiffs. Accordingly, all discrete and separable time that Plaintiff's counsel spent on class issues in this case is excluded from the fee award.

Plaintiff contends that even if time spent on class certification is noncompensable, time spent on the Motion to Contact Class members nevertheless should be compensated. According to Plaintiff, this motion represented an attempt to obtain discovery from individuals who might be potential witnesses, in addition to potential parties, in the case. That may be true, but the Court refuses to compensate this time. If Plaintiff had not attempted to certify this case as a class action, Plaintiff would not have needed a motion from the Court to seek out witnesses. It makes little sense for the

Court to compensate Plaintiff for such a motion here where class action status ultimately was denied.

iii. DEPOSITIONS & WITNESSES

Plaintiff requests fees for 407.2 hours related to depositions and other pre-trial activities involving witnesses. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 80.1 hours; Patrick McKee – 239.3 hours; Deborah Barrow – 57.5 hours; Holli Hidden – 28.1 hours; and assistant Dan McKee – 2.2 hours. Fulton County challenges this requested amount on a number of grounds. First, Fulton County says that all hours spent deposing the dismissed Defendants should be excluded. Fulton County states that 44.7 hours were spent by Plaintiff deposing dismissed Defendants Andrew Jenkins, Nancy Boxill, Emma Darnell, Robert Fulton, Michael Hightower, Gordon Joyner, Tom Lowe and Mitch Skandalakis. The Court disagrees that the time spent deposing these individuals should be excluded. These individuals were not deposed simply as Defendants. They were also deposed as commissioners and employees of Fulton County who knew details of the County's minority and female contracting practices. Their depositions, therefore, were an integral part of Plaintiff's discovery as it related to Defendant Fulton County. Accordingly, all time spent on these depositions is compensable.

Second, Fulton County contends that the Court should exclude 70% of the time Patrick McKee spent preparing for and defending the deposition of Daniel Webster and 60% of the time spent preparing for and defending the deposition of Peggy Webster. Fulton County argues that 17 hours spent on these depositions should be attributed to Plaintiff's prayer for punitive damages, 3.4 hours should be attributed to their

participation in the case as ultimately dismissed Plaintiffs, and 1.6 hours should be attributed to the unsuccessful retaliation claim. Thus, in all, 22.0 hours should be excluded from the Websters' depositions. In addition, Fulton County contends that an estimated 5 hours should be excluded for time that Mason Barge spent preparing for and defending the deposition of Kelly Goff. The Court disagrees. First, Plaintiff should not be penalized for defending depositions that Fulton County requested and conducted. Second, as to the Webster's depositions, this Court refuses to split the case into the smallest atoms possible. That would occur if the Court apportioned time spent in the Websters' depositions by the specific questions and answers to a particular claim. *See Commissioner, INS v. Jean*, 496 U.S. 154, 161-62, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990) (stating that "fee-shifting statutes favor[ ] treating a case as an inclusive whole, rather than as atomized line-items"). While *ACLU of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999), set forth a demanding standard for district courts to meet in explaining the reasons underlying their award of attorneys' fees, the Court does not believe that the Eleventh Circuit intended the *Barnes* decision to turn its district judges into bean counters, as would result if the Court followed Fulton County's reasoning to its illogical conclusion. Time spent preparing for and defending the Websters' and Kelly Goff's depositions is compensable in whole.

Third, Fulton County contends that the Court should exclude 33.0 of the hours that Plaintiff spent on the depositions of Michael Cooper, Ben Edwards, and Bill Mowrey. Fulton County says this requested exclusion reflects the amount of time that Plaintiff spent in the depositions on the failed punitive damages claim. The Court believes that a reduction is not warranted. The questions asked in the depositions

related not only to punitive damages, but also to the issues of declaratory relief, injunctive relief and compensatory damages. It is impossible for this Court to separate out any group of questions in those depositions as applying only to punitive damages and not affecting the other claims at all. Because the time spent on these depositions related not only to the unsuccessful claim for punitive damages, but also to the successful claims for declaratory relief, injunctive relief and compensatory damages, all the hours are compensable. Given both the factual complexity of this case and its protracted course, the Court concludes that 407.2 hours spent on depositions and witnesses is not excessive.

iv. DOCUMENT PRODUCTION & ANALYSIS

Plaintiff requests fees for 2,444.0 hours related to document production and analysis. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 205.6 hours; Patrick McKee – 88.7 hours; Deborah Barrow – 769.4 hours; Holli Hidden – 1,240.6 hours; Susan Rickertsen – 81.3 hours; and Dan McKee – 58.4 hours. About 40% of the time that Plaintiff's counsel expended in the entire case was spent on document production and analysis. Not surprisingly, time spent on this task is what Fulton County most strongly challenges in the whole fee request.

First, Fulton County challenges all time included in this category that led to information Plaintiff used in its attempt to certify the case as a class action. Specifically, Fulton County contends that this Court should exclude all time spent on document production and analysis up until May 1, 1998, the date of Plaintiff's last brief on the class certification issue. In all, Fulton County seeks to have the Court exclude 1,918.5 hours for this reason. This amount represents 78% of all time

spent on document production and analysis. Fulton County's position, as it stated in its closing argument at the evidentiary hearing, is that the Court should deduct hours spent on any task related to an unsuccessful claim even if time spent on that task also had a permissible purpose. That is not the law in this Circuit or any other. Indeed, the law is the opposite. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley v. Eckerhart*, 461 U.S. at 441, 103 S. Ct. 1933. The time that Plaintiff spent on document production and analysis in this case did not relate solely to the unsuccessful class certification issue, but also provided information that supported the core of Plaintiff's successful claims. As the Court wrote in its June 11, 1999, Order following the bench trial:

> In this regard, the Court accepts as credible the testimony of Thomas Bruns that various contracting procedures were employed by Fulton County department heads, buyers and the Office of Contract Compliance to award contracts to minorities in order to achieve the numerical percentages established by the program. *The Court accepts this testimony as credible because it is corroborated by the documentary evidence from the bid files.* The procedures used to achieve the participation goals included disqualifying majority firm bidders for failing to comply with the program (Pl. Exh. 3-25), awarding contracts to higher bidders in order to obtain minority participation (Pl. Exh. 35, 37), splitting bids so that minority firms received part of a contract when a majority firm was the overall low bidder (Pl. Exh. 49-54), solicitation of minority firms after bids were closed (Pl. Exh. 56, 57), rebidding contracts in order to obtain minority participation (Pl. Exh. 58),

> treatment of the participation goals as mandatory requirements (Pl. Exh. 64-66, 70, 71, 116), awarding "points" for minority participation in evaluation criteria (Pl. Exh. 73-77), and awarding an entire contract to minority vendor overall low bidders rather than splitting the contract to give part to majority firms low bidding on some items (Pl. Exh. 78-84). The rebuttal testimony of Mr. Cooper offered by the County as to these examples of the practices identified by Mr. Bruns *either fails to address the exhibits relied upon by the Court or is contradicted by the documents.*

Webster, 51 F. Supp. 2d at 1381-82. All this corroborative evidence was obtained through the document production and analysis. Because time spent on document production and analysis provided information that supported the core of Plaintiff's successful claims, it is compensable regardless of whether the same information was used for unsuccessful claims.

Second, Fulton County challenges the hours spent on additional review of documents to prepare the class certification motion. At the evidentiary hearing, Plaintiff segregated 59.0 hours spent by Deborah Barrow and 0.8 hours spent by Holli Hidden and admitted that those hours should have been included in the class certification category rather than document production and analysis. According to Plaintiff, these hours reflect time spent reviewing documents solely to prepare the class certification motion. The Court instructed Plaintiff to move the 59.8 hours to the class certification category and provide the Court with an amended summary calculation to reflect this change. Plaintiff has provided the Court with an amended summary calculation that moves these 59.8 hours and also another 5.6 hours to the

class certification category. (Plaintiff's Amended Summaries in Support of Petition for Attorneys' Fees and Non-Taxable Costs, at 2.) [Doc. 344]. It is that amended summary from which the Court is calculating Plaintiff's award. Accordingly, these hours are not discussed here but instead have been included in the Court's analysis of the class certification issue.

Third, Fulton County challenges certain time entries of associates that were logged under "Document Production & Analysis" instead of "Class Certification." Fulton County contends that these entries relate solely to class certification and, therefore, are not compensable. The challenged time entries are as follows: (1) 17.6 hours spent by Deborah Barrow on February 16-19, 1998, to "prepare written document concerning motion to certify class"; (2) 6.0 hours spent by Deborah Barrow on February 28, 1998, for "organization and indexing of master file and prepare docs for motion to certify class"; (3) 2.0 hours spent by Susan Rickertsen on February 12, 1998, to "review summaries of bid file reviews; identify examples of issues that might be pertinent to class motions and other matters; prepare note to Holli Hidden and Deborah Barrow;" and (4) 3.4 hours spent by Holli Hidden on February 14, 1998, to "compile evidence in support of motion for class cert." As to the first and second items noted above, Mr. Barge explained on cross-examination at the evidentiary hearing that the information compiled was used not only for the motion to certify the class but also as a source to determine possible witnesses for Plaintiff's case, to prove the existence of a pattern or practice of discrimination, and to discredit one of Fulton County's witnesses at the jury trial. As a result, these time entries are compensable because they do not relate solely to the class certification issue but instead played a role in Plaintiff's

overall success in this case. As to the third item noted above, Plaintiff's amended summary moved these 2.0 hours from "Document Production & Analysis" to "Class Certification." Thus, Plaintiff's challenge to the inclusion of these 2.0 hours in this category is moot, and they have already been excluded by the Court's decision to exclude time spent on class certification. The same is true of the fourth item. Accordingly, none of Fulton County's objections here have merit.

Fourth, Fulton County challenges the billing judgment of Plaintiff on the grounds that Plaintiff's document production and analysis process was inefficient. Accordingly, Fulton County requests that this Court should reduce by 50% all hours spent on document production and analysis after the class certification motion was fully briefed on May 1, 1998. The Court disagrees. At the evidentiary hearing, Plaintiff explained in great detail the method it employed for document production and analysis and its reasons for employing those methods. Mr. Barge testified that Plaintiff first requested that Fulton County provide it with a list of purchase orders within the MFBE program. According to Mr. Barge, approximately 4,000 purchase orders fell within this category. Several months after receiving the purchase order lists, Plaintiff requested access to the bid files that corresponded to each of the purchase orders to determine the County's bidding procedure, how bidders were treated in general, and whether minority bidders were treated differently. When Fulton County finally provided the first of these files to Plaintiff, counsel immediately noticed that the numbering system for the bid files was completely different from the purchase order lists. Furthermore, the files did not include purchase order numbers, so there was no way to know from the information in the bid file which bidder

actually received the contract. Plaintiff had to go through each file gleaning all information there and not knowing what information would end up being beneficial. The goal was to match purchase orders to bid files and the identification of discrimination-related legal issues. To deal with Fulton County's confusing system, Plaintiff's counsel set up their own computer database in an attempt to organize documents they had reviewed and to prevent attorney duplication in review of the files.

Fulton County knew that it was providing Plaintiff with a confusing array of information, and it did nothing to make Plaintiff's task any easier. Plaintiff filed a Motion to Compel Fulton County to provide Plaintiff a list of bid files and their corresponding purchase orders. The Court refused to compel Fulton County to provide this information and instructed Plaintiff that it would have to do the work itself. Mr. Barge sent Fulton County's counsel a letter that Plaintiff would do the work itself but stated that it would be more efficient for Fulton County to assist in the process. (Plaintiff's Brief in Support of Specification and Itemization of Attorney's Fees and Non-Taxable Costs, Ex. A) [Doc. 191]. Most importantly, Mr. Barge informed Fulton County's counsel that if Plaintiff did the work itself, it would be very time-consuming. Mr. Barge warned that if Plaintiff won the case, the day would come when Fulton County would end up paying for this extra time expended by Plaintiff. That day has arrived. Fulton County was warned of the ramifications of its actions and nevertheless refused to assist Plaintiff's counsel. Fulton County is directly responsible, in part, for the enormous number of hours expended on document production and analysis in this case. The Court does not find that Plaintiff failed to exercise billing judgment in requesting full compensation for the efforts of counsel in performing this

task. *See City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986) (stating that a defendant "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response"); *Shipes v. Trinity Indus.*, 987 F.2d 311, 321 (5th Cir. 1993) (stating that "obstinate conduct by opposing counsel is compensated by the additional number of hours required to prevail over such obstinacy"); *Marbled Murrelet v. Pacific Lumber Co.*, 163 F.R.D. 308, 326 (N.D. Cal.1995) (stating that defendant's counsel "may have the right to play 'hardball' when defending its client's interests, but it should bear the costs associated with pursuing this type of obstructionist strategy").

Fifth, Fulton County challenges the time included in this category that relates to the dismissed retaliation and post-1996 claims. At the evidentiary hearing, Plaintiff responded that no documents obtained in the course of document production and analysis relate solely to the retaliation and post-1996 claims. Plaintiff did admit, however, that 4.3 hours were spent by Mr. Barge on January 19, 20, 23, and 27, 2000, on review of documents solely in regards to the retaliation and post-1996 claims. Plaintiff also admitted that 8.5 hours of the 10 hours spent by Mr. Patrick McKee on document production and analysis between the bench and jury trials related solely to the retaliation and post-1996 claims. Plaintiff's amended summary filed after the evidentiary hearing at the Court's instruction removed these hours. Accordingly, this objection is moot.

Sixth, Fulton County challenges the travel time that Plaintiff has attributed to document production and analysis. Fulton County contends that the 75.9 hours that Plaintiff's attorneys expended traveling to Fulton County's offices to conduct

document production and analysis should be excluded. Reasonable travel time of the prevailing party's attorneys ordinarily is compensated on an hourly basis. *See Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983) (discussing compensation of travel time in calculation of reasonable hours). At the evidentiary hearing, Mr. Barge explained his policy for counting travel time in this case. Where an attorney was traveling between the firm's office and Fulton County's offices, Mr. Barge instructed the attorney to count her travel time. Where, however, the attorney was traveling between home and Fulton County's offices, as might occur at the beginning or end of a work day, Mr. Barge instructed the attorney not to count her travel time. This does not seem to the Court to be an unreasonable policy. As to the issue of billing judgment regarding travel time, Plaintiff's records show that its attorneys typically billed about 15 minutes for travel on foot each way between their offices near Peachtree Center and Fulton County's offices further downtown. As Fulton County alerts the Court, it is true that some of the entries reflect somewhat greater travel time, while others reflect somewhat less travel time. On average, though, the travel time each way was about 15 minutes. The Court finds nothing unreasonable in this calculation. Accordingly, no hours are excluded for improper travel time.

Seventh, Fulton County challenges time in this category that it considers performance of clerical work by an attorney. Specifically, it challenges 20.0 hours spent by Mr. Barge, 3.0 hours spent by Ms. Rickertsen, 114.7 hours spent by Ms. Hidden, and 147.5 hours spent by Ms. Barrow, for a total of 285.2 hours challenged. Plaintiff responds that it was necessary for file administration of the document production process to be performed by an attorney because of the sheer

complexity of the case and the need for legal knowledge to separate the files by relevant issues. The work conducted was not simply data entry but rather correlation of facts to legal issues. As discussed above, at the evidentiary hearing Plaintiff explained in great detail exactly how it organized the documents obtained in this case and why it did so. Based on that testimony, this Court concludes that the hours Fulton County contests as "clerical work" actually was work that required the skills of someone with legal training. Accordingly, the hours challenged here are neither excluded from the fee award nor compensated at a reduced rate.

Eighth, Fulton County challenges the time that Mr. Barge spent training an associate on how to review, organize and catalog the documents obtained from Fulton County. Specifically, Fulton County objects to 4.0 hours attributed to Mr. Barge and 2.5 hours attributed to Ms. Rickertsen. The Court concludes that this time is compensable for the same reasons that time spent on alleged "clerical work" is compensable. Accordingly, these 6.5 hours are not excluded. For the reasons set forth above, the Court concludes that 2,444.0 hours spent on document production and analysis in this case is not excessive. In reaching this conclusion, the Court is mindful that it took the Court two full days just to review the documents that were introduced in evidence at the bench trial.

v. WRITTEN DISCOVERY

Plaintiff requests fees for 235.7 hours expended on written discovery. According to Plaintiff, work related to written discovery is divided as follows: Mason Barge – 32.2 hours; Patrick McKee – 100.4 hours; Deborah Barrow – 73.9 hours; Holli Hidden – 3.8 hours; and Susan Rickertsen – 25.4

hours. Fulton County has challenged all written discovery conducted before May 1, 1998 on grounds that it necessarily must relate to the class certification issue. As the Court explained above in the "Document Production & Analysis" category, this contention is meritless. Fulton County has not made any other challenge to time in this category. Given both the factual complexity of this case and its protracted nature, the Court concludes that 235.7 hours spent on written discovery is not excessive. Accordingly, all time in this category is compensable.

vi. OTHER INVESTIGATION & BACKGROUND RESEARCH

Plaintiff requests fees for 130.9 hours related to other investigation and background research. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 48.4 hours; Patrick McKee – 39.4 hours; Deborah Barrow – 24.8 hours; Holli Hidden – 10.8 hours; Susan Rickertsen – 4.5 hours; and Dan McKee – 3.0 hours. Fulton County challenges the following items in this category: First, Fulton County challenges 0.3 hours Mr. Barge spent on March 31, 1998 reviewing information from the State of Georgia's Attorney General's office regarding Georgia's Open Records Act. This background research related to obtaining documents for Plaintiff's retaliation and post-1996 claims. Second, Fulton County challenges an estimated 25 hours that Plaintiff spent on Open Records Act requests for 1997, 1998, and 1999 documents related to its post-1996 claims. Third, Fulton County challenges 0.5 hours that Mr. Barge spent on August 18, 1998, reviewing a document related to Commissioner Emma Darnell and a letter that Mr. Barge wrote to Fulton County's counsel based on the document. Fulton County contends that this time

should be omitted because Ms. Darnell was dismissed from the case. Fourth, Fulton County challenges 4.0 hours on April 17, 1998, that Mr. Barge spent reviewing depositions and researching prerequisites for injunctive relief and the standing of Mr. and Mrs. Webster, which the Court ultimately found lacking. Fifth, Fulton County challenges 0.6 hours logged in this category on January 21, 1998, by Patrick McKee for reviewing documents related to Plaintiff's reply brief to its Motion to Contact Class Members.

As to the first two challenges, the Court concludes that time spent on these activities is compensable. Although the post-1996 claims were dismissed, they nevertheless remained relevant to issues of Webster Green Thumb's standing which Fulton County has persistently and unsuccessfully challenged throughout this litigation. Thus, the Open Records Act research that Plaintiff conducted and the documents that Plaintiff obtained from that research relate to a successful aspect of this case, and not simply dismissed claims. The third challenge is also without merit. Although Ms. Darnell was dismissed from this case, the government body of which she is a commissioner, Fulton County has remained a party. Plaintiff's contacts with Ms. Darnell related not merely to her as an individual, but as an officer of Fulton County. The 0.5 hours that Mr. Barge spent reviewing a document and writing a letter related to Ms. Darnell is compensable. Fulton County's fourth challenge is warranted in part. The time spent on the standing of the Websters is noncompensable. The other tasks described in this entry are compensable. If Plaintiff had included its standing research here with time it spent responding to one of Fulton County's dispositive motions, such as its Motion for Summary Judgment, this Court clearly would exclude the time. There is no reason the Court should not do so simply because Plaintiff instead has

placed the research in an "Other Investigation & Background Research" category. Accordingly, this Court thus apportions the time in accordance with Judge Forrester's practice in *Duckworth v. Whisenant*, No. 1:89-CV-1102-JOF (N.D. Ga. Jan. 31, 1995), *aff'd*, 97 F.3d 1393, 1397 (11th Cir. 1996), where the Court did not exclude entire combined entries, but instead attempted to apportion time to each activity in an even-handed manner. The Court concludes that 1.5 hours fairly reflects the time spent on standing in this April 18, 1998, entry. As to Fulton County's fifth challenge, the Court also agrees that the time is noncompensable. Those 0.6 hours should have been included in the "Class Certification" category which the Court has excluded in its entirety. Since they were not included in that category, they are excluded here. Otherwise, Plaintiff's requested time in this category is not excessive. Accordingly, 128.8 hours are compensable.

vii. EXPERT REPORTS

Plaintiff requests fees for 190.0 hours related to both Plaintiff's and Fulton County's expert reports. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 140.6 hours; Patrick McKee – 47.5 hours; Deborah Barrow – 1.9 hours. Fulton County has not challenged any of the time in this category at all, or at least not with such specificity as to alert the Court that a reduction is warranted. *See Hensley*, 461 U.S. at 437, 103 S. Ct. 1933 (stating that objections and proof concerning hours that a party wants excluded must be specific and "reasonably precise"). Accordingly, Plaintiff is entitled to fees for all hours that it requests on the task of "Expert Reports."

viii. DISCOVERY MOTIONS

Plaintiff requests fees for 123.5 hours related to the parties' various discovery and pre-trial motions. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 65.8 hours; Patrick McKee – 51.5 hours; Holli Hidden – 6.2 hours. Fulton County asks that this Court look at each of these motions, determine which party won the motion, and reduce Plaintiff's fee award for motions on which it did not succeed. These challenges include time Plaintiff spent on unsuccessful motions to compel and attendance at hearings and conferences where Plaintiff was at least partially unsuccessful. The United States Supreme Court has admonished federal courts not to split a case into the smallest atoms possible. *See Commissioner, INS v. Jean*, 496 U.S. 154, 161-62, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990) (stating that "fee-shifting statutes favor [ ] treating a case as an inclusive whole, rather than as atomized line-items"). Likewise, the Eleventh Circuit has instructed its district courts to focus on "the significance of the overall results as a function of total reasonable hours," *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988), and has informed litigants that "[t]he theory that fee applications should be dissected into 'winning' and 'losing' hours with the latter being non-reimbursable contradicts the law of this circuit." *Dowdell v. City of Apopka*, 698 F.2d 1181, 1187 (11th Cir. 1983). This Court believes that it would be ignoring these instructions if it evaluated each discovery motion in this case on the basis of which side prevailed and then apportioned a fee award on that basis. It is the nature of the litigation process that parties often will disagree on the course of discovery. Plaintiff's counsel did not take unreasonable positions in the discovery disputes although they did not always get everything that they

wanted. A party that prevails on the overall case should not be penalized simply because it did not succeed on each contention raised. *Hensley v. Eckerhart*, 461 U.S. 424, 441, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). Accordingly, this Court refuses to separate each of the discovery motions in this case by success rate. All time spent by Plaintiff on discovery motions is compensable.

At the evidentiary hearing, Plaintiff conceded that 30.5 hours spent attempting to compel documents relating solely to the retaliation claim is noncompensable. Plaintiff informed the Court that it would exclude that time from its final calculation, and it appears to have done so in its amended summary. Accordingly, Fulton County's argument on that issue is moot. Otherwise, all compensation requested for time spent on discovery motions is granted. Given both the factual complexity of this case and its protracted nature, the Court concludes that 123.5 hours spent on discovery motions is not excessive.

ix. MOTIONS FOR SUMMARY JUDGMENT

Plaintiff requests fees for 395.7 hours related to the parties' summary judgment motions. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 201.2 hours; Patrick McKee – 169.7 hours; Deborah Barrow – 24.8 hours. Fulton County challenges the time that Plaintiff spent on these motions that related to the dismissed Plaintiffs and Defendants and the dismissed retaliation and state-law claims. Specifically, Fulton County contends that the Court should attribute (1) 5% of the time spent on motions for summary judgment to the retaliation claim, (2) 5% of the time spent on the motions for summary judgment to the dismissal of the Websters as Plaintiffs, (3) an

additional 5% of the time spent on the motions for summary judgment to the dismissal of Goff as a Plaintiff, and (4) 10% of the time spent on the motions for summary judgment to the dismissed Defendants. After careful review, the Court concludes that 5% is a fair amount of time that the Plaintiff spent on the discrete and unsuccessful retaliation and state-law claims in the summary judgment motions. Likewise, 5% fairly approximates the time spent on the standing of the Websters, which the Court ultimately found lacking. As to Goff, the Court concludes that 2% is a fairer approximation than 5% of the time spent on his standing. As to the dismissed Defendants and their immunity arguments, the Court concludes that 5% fairly approximates the time spent on those discrete and unsuccessful claims in this case. Accordingly, the time that Plaintiff spent on the motions for summary judgment is reduced by 17% to reflect this lack of success on discrete and unsuccessful claims and issues. This reduction is apportioned among each member of the firm who worked on the motions. Otherwise, time spent on these motions is compensable. Given the factual complexity of this case, especially the plethora of documentary evidence that Plaintiff had to condense and explain at the summary judgment stage, the Court concludes that 328.4 hours spent on the summary judgment motions, response briefs, and reply briefs is not excessive.

x. OTHER PRE-TRIAL MOTIONS

Plaintiff requests fees for 333.9 hours related to pre-trial motions and hearings for both the bench trial and the jury trial. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 134.1 hours; Patrick McKee – 199.8 hours. As with the discovery motions, Fulton County asks the Court to look at each of these motions,

determine which party won the motion, and reduce Plaintiff's fee award for motions on which it did not succeed. These challenges include motions to exclude, a motion to disqualify, motions for reconsideration, motions in limine, part of Plaintiff's proposed draft of the Pre-Trial Order, attendance at hearings and conferences where Plaintiff was at least partially unsuccessful, and even proffers. For the same reasons elaborated in the "Discovery Motions" section, the Court refuses to separate each of the pre-trial motions by success rate and then apportion a fee award on that basis. Again, Plaintiff's counsel did not take unreasonable positions in the pretrial motions although they did not always get what they wanted.

This Court does, however, exclude from the fee award time spent on one pre-trial motion that it considers "discrete and unsuccessful." *See Duckworth v. Whisenant*, 97 F.3d 1393, 1397 (11th Cir. 1996) (deducting time spent on "discrete and unsuccessful claims"). The Court granted summary judgment in favor of Fulton County on Plaintiff's retaliation claims. The Court held:

> The Defendants contend that the Plaintiffs' retaliation claim fails due to insufficient evidence and the absence of a retaliation claim where the government fails to award contracts to independent contractor bidders. This Court has found no authority to support a specific retaliation claim under Section 1981 or the Equal Protection Clause for the local government's failure to award contracts to independent bidders. Accordingly, the Court finds that the Defendants are entitled to summary judgment as to the Plaintiffs' retaliation claim in Count VI of the Second Amended Complaint.

Webster, 44 F. Supp. 2d at 1381 (citations omitted). Nevertheless, throughout the rest of this case, Plaintiff repeatedly asked the Court to reconsider this decision. Each time the Court refused. Accordingly, the Court excludes the following entries because they apply to an issue that Plaintiff continually reasserted and that the Court each time refused to reconsider: 1.1 of the 11.0 hours that Patrick McKee spent on August 30 and 31, 1999, preparing for and attending a hearing at which he argued for reconsideration of the retaliation claim; 0.5 hours that Mason Barge spent on July 1, 1999, on "[l]egal research re retaliation under 1981; telephone conference with [Patrick McKee] re same"; 0.5 hours that Mason Barge spent on July 7, 1999, in a "[t]elephone conference with [Patrick McKee] re motion for reconsideration of retaliation claim"; 0.2 of the 0.4 hours that Mason Barge spent on July 8, 1999, in a "[t]elephone conference with [Patrick McKee] re retaliation claim, bill of costs"; and 5.4 of the 54 hours that Patrick McKee spent on the Pre-Trial Order in November 1999.

One of Fulton County's meritless objections in this area deserves some discussion. Fulton County has challenged the time spent on Plaintiff's Motion to Disqualify [Doc. 214]. Plaintiff filed a Motion to Disqualify Fulton County's counsel from representing both Fulton County and Michael Cooper on grounds that an inherent conflict of interest existed. Plaintiff filed this motion only after the Court raised the issue itself at an August 31, 1999, hearing. As the Court later explained:

> The potential conflict is that if Defendant Cooper contends that he took certain action pursuant to the County's MFBE Plan, the County would be liable but Mr. Cooper could claim qualified immunity. On the other hand, if Mr. Cooper

denies that he took any action pursuant to the MFBE Plan, and the jury finds that his actions were discriminatory, Mr. Cooper may be subject to compensatory and punitive damages while the County escapes any liability.

Webster v. Fulton County, No. 1:96-CV-2399-TWT (N.D. Ga. Nov. 18, 1999). Eventually, the Court determined that Fulton County and Mr. Cooper had both adequately consented to the joint representation, and Plaintiff's Motion to Disqualify was denied. *Id.* Nevertheless, just because the Court found that "[t]he potential conflict was not so overwhelming as to checkmate the Defendants' voluntary choice of counsel," *id.*, it cannot be said that Plaintiff's Motion to Disqualify was "clearly without merit." *See Popham v. City of Kennesaw*, 820 F.2d 1570, 1579 (11th Cir. 1987) ("[I]t is clear that '[t]ime spent pursuing unsuccessful claims that were clearly without merit should be excluded.'"). The facts show that an issue of conflict did exist and that Defendants' counsel remedied it only after the issue was raised by the Court and Plaintiff. Plaintiff's motion, therefore, was not frivolous and the time spent on it is compensable. In all, the Court compensates Plaintiff for 326.2 hours spent on pre-trial motions and hearings. Given the factual complexity of the case and the amount of procedural wrangling that occurred, the Court concludes that 326.2 hours spent on pre-trial motions and hearings is not excessive.

xi. BENCH AND JURY TRIALS

Plaintiff requests fees for 1,179.8 hours for the bench and jury trials. Plaintiff states that 604.9 hours were expended on the bench trial and another 574.9 hours were expended on the jury trial. According to Plaintiff, the hours spent on the trials

are divided as follows: Mason Barge – 317.5 hours; Patrick McKee – 728.0 hours; Dan McKee – 134.3 hours. In this category, Fulton County challenges round-number billing engaged in by Patrick McKee under the heading "trial preparation." According to Fulton County, all but one or two of Plaintiff's entries here are rounded to the hour or half-hour. Fulton County has presented no evidence that these entries are inaccurate. It simply challenges round-number billing *per se*. The Court concludes that this practice during the trial and the days leading up to it is not so egregious as to warrant a reduction. It is quite likely that on some days Mr. McKee spent more than a round-numbered amount of time at trial or preparing for it, while other days he possibly spent less. Thus, the hours listed are likely a fair reflection of time actually spent. Fulton County has not shown that is not the case. Accordingly, this challenge is rejected. Significantly, Fulton County has not shown that its outside counsel billed the County for materially less time for the trials.

Fulton County also contends that one-fourth of the time that Patrick McKee spent on the jury trial and preparation for it should be excluded since Plaintiff lost on its punitive damages claim. According to Fulton County, time attributed to Patrick McKee should be excluded to the extent of 111.5 hours for this reason. The Court disagrees. At the evidentiary hearing, Mr. Barge and Mr. Patrick McKee stated that they would not have tried this case any differently even if there had not been a claim for punitive damages. All activities conducted in this case, including Plaintiff's questioning of Michael Cooper on cross-examination, related to the underlying claim for compensatory damages, as well as the punitive damages claim. It was not the questions asked that determined whether punitive damages would be awarded, but rather the answers that Mr. Cooper provided and the

jury's interpretation of whether Mr. Cooper acted with the requisite malice. Since the jury felt he had not acted with the requisite malice, no punitive damages were awarded. Compensatory damages, however, were awarded, in some measure based on the cross-examination of Mr. Cooper by Plaintiff's counsel. As the undersigned was present at the trial, it is his conclusion that Plaintiff's case would not have been conducted any differently even if the Court had not allowed a claim for punitive damages to be presented to the jury. Accordingly, the Court will not exclude the 111.5 hours to which Fulton County objects here.

Fulton County also seeks to exclude time logged in this category for research and argument related to Daniel and Peggy Webster's standing. The specific time entries challenged are as follows: (1) that part of the 11.8 hours that Mason Barge spent on May 8, 1999, that related to "research re standing of shareholders"; (2) that part of the 9.5 hours that Mason Barge spent on May 15, 1999, on "legal research on standing"; (3) that part of the 8.0 hours that Mason Barge spent on May 20, 1999, to "[d]raft, edit, file, and serve Reply Brief on Standing"; and (4) 2.0 hours that Mason Barge spent in a May 21, 1999, court appearance on the standing issue. The Court agrees that these items should be excluded from the fee award. Each entry relates to the standing of the Websters, and the Court ultimately concluded that they did not have standing. Accordingly, 2.0 hours are excluded for item (4); and the Court concludes that 1.8 hours is a fair reflection of the hours actually expended on standing in item (1); 2.0 hours is a fair reflection for item (2), and 6.0 hours is a fair reflection for item (3). Accordingly, 11.8 hours are noncompensable here for work solely related to the Websters' standing as Plaintiffs. Plaintiff's amended summary, however, shows that 10.5 of these hours have already been

removed from the fee petition. Accordingly, only the remaining 1.3 hours not already eliminated is excluded here. Otherwise, the 1,178.5 hours requested are compensable.

xii. MISCELLANEOUS CORRESPONDENCE AND CONFERENCES

Plaintiff requests fees for 166.3 hours spent on miscellaneous correspondence and conferences pertaining to this case. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 72.4 hours; Patrick McKee – 71.4 hours; Deborah Barrow – 5.5 hours; Holli Hidden – 10.9 hours; Susan Rickertsen – 6.1 hours. Fulton County challenges a number of entries in this category on grounds that they relate solely to the noncompensable issue of class certification. First, Fulton County challenges all conferences held by Plaintiff's counsel before it filed its final reply brief on class issues on May 1, 1998. As this Court has explained twice already in this Order, this argument by Fulton County is without merit. Fulton County cannot simply allege that all time spent by Plaintiff in this case until May 1, 1998, relates solely to class issues. Accordingly, no time is excluded for this reason.

Second, Fulton County challenges a number of entries that on their face reflect that they apply to class certification: (1) 0.5 hours Mason Barge spent on December 12, 1997, in an "office conference with [Patrick McKee] re: class members, various issues"; (2) 0.4 hours Mason Barge spent on January 21, 1998, in an "office conference with [Patrick McKee] re: contacting potential class members"; (3) 0.5 hours Patrick McKee spent on April 29, 1998, in "consultation regarding class cert issues with [Mason Barge]"; (4) 0.3 hours Susan Rickertsen spent on February 4,

1998, involving "office conference with Mason Barge and legal research on motion to certify class"; (5) 0.2 hours Susan Rickertsen spent on February 9, 1998, in an "office conference with Mason Barge on motion to certify class"; (6) 0.2 hours Holli Hidden spent on February 26, 1998, in an "office conference with Mason Barge re: evidence in support of motion for cert"; and (7) 0.8 hours Holli Hidden spent on February 27, 1998, to "compile evidence in support of motion for class cert." The Court agrees that these entries on their face appear to relate solely to class issues. Plaintiff has done nothing to refute this appearance. Accordingly, these 2.9 hours are excluded from the fee award.

Third, Fulton County challenges an entry that appears to relate solely to class certification based on the date of entry: 0.4 hours Patrick McKee spent on January 21, 1998 to "receive and review document concerning reply brief and consultation with [Mason Barge]." Plaintiff's reply brief for its Motion to Contact Class Members was filed January 22, 1998, the day after this entry. No other reply briefs were filed by Plaintiff near this date. Accordingly, the evidence supports a finding that this time relates solely to class issues. Accordingly, 0.4 hours is excluded.

Fourth, Fulton County challenges entries that appear to relate solely to dismissed Plaintiffs: (1) 4.1 hours Susan Rickertsen spent on September 15, 1997, to "respond to written discovery (telephone conferences with Alex Marchetti and Willie Hill; office conferences with Mason Barge and Pat McKee; draft responses to interrogatories and document requests)"; (2) 1.0 hour Susan Rickertsen spent on September 16, 1997, regarding "preparation for and attendance at meeting with Willie Hill, Alex Marchetti, Mason Barge, and Pat McKee"; (3) 0.5 hours Patrick McKee

spent on September 16, 1997, attending the same meeting; (4) 0.1 hours Susan Rickertsen spent on September 25, 1997, in a "telephone conference with Alex Marchetti re: Minority and Willie Hill withdrawing; office conference with Mason Barge"; (5) 0.5 of 1.0 hour that Patrick McKee spent on March 25, 1998 in "consultation regarding status of Min. Dist. and Goff, correspondence with Mr. Wiener on status of documents, review additional documents produced"; (6) 1.0 of the 2.0 hours Patrick McKee spent on March 31, 1998, to "receive and review document concerning deposition of Skandalakis, conference with Mr. Barge on Min. Dist., review correspondence with Mr. Wiener on responses to discovery"; and (7) 0.5 hours Mason Barge spent on October 13, 1998, on a "letter and form withdrawal to Willie Hill/MDC." After careful review, the Court agrees that the time reflected in the first four and the seventh entries should be stricken from the fee award entirely. All these entries appear to relate solely to the withdrawal of dismissed Plaintiff Minority Distributing Corp. The Court also agrees that part of the fifth and sixth entries should be excluded from the fee award on grounds that part of the listed time applies solely to dismissed Plaintiffs. The Court, however, believes that 0.5 hours is a more fair reflection in item (6) of the amount of time that Mr. McKee likely spent in conference with Mr. Barge regarding Minority Distributing Corp. This Court thus apportions Items (6) and (7) in accordance with Judge Forrester's practice in *Duckworth v. Whisenant*, No. 1:89-CV-1102-JOF (N.D. Ga. Jan. 31, 1995), *aff'd*, 97 F.3d 1393, 1397 (11th Cir. 1996), where the Court did not exclude entire combined entries, but instead attempted to apportion time to each activity in an even-handed manner. The Court concludes that 7.2 hours should be excluded for time spent involving conferences and correspondence on dismissed Plaintiffs. In all, a total of 10.5 hours are excluded in this

category for noncompensable conferences and correspondence. Otherwise, 155.8 hours are compensable. Given both the factual complexity of this case and its protracted nature, the Court concludes that the 155.8 hours spent on miscellaneous correspondence and conferences is not excessive.

xiii. OTHER MISCELLANEOUS MATTERS

Some of Fulton County's objections cut across numerous categories and cannot adequately be addressed within one specific category. Other objections do not fall neatly within any category. Accordingly, the Court addresses them here to ensure that it has not neglected to consider any of Fulton County's objections. First Fulton County challenges all time related to Plaintiff's post-1996 claims. Some of the time spent on these claims has been discussed above. Other time spent on these claims does not fall neatly within a single category. Whatever the category, the Court's ruling is the same. Even though the claims did not succeed, they were integral to Webster Green Thumb's standing in this case. Accordingly, all time spent on the post-1996 claims is compensable.

Second, Fulton County challenges all time attributable to Daniel McKee on grounds that he has not been trained in paralegal duties. In *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989), the Supreme Court held that paralegal time is compensable in the same manner as attorneys' fees. *Id.* While it is true that time for secretaries, office managers, and other administrative personnel is deemed to be subsumed into an attorney's market rate, the same is not true for paralegals, law clerks, and other legal assistants to the extent they perform work

traditionally performed by an attorney. *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988). The question then is whether the time billed by Daniel McKee in this case is work traditionally performed by an attorney. The time Daniel McKee spent at the bench and jury trials constitutes 134.3 of the 197.9 hours attributed to him in this case. Another 58.4 hours of his time relates to document production. Thus, 97% of his time billed in this case relates to these two tasks. This Court observed the activities of Daniel McKee at trial where he played an integral role assisting counsel in the presentation of its case. Furthermore, the work that Daniel McKee performed on document production and analysis does not appear materially different than the work that the associate attorneys performed. Finally, the record supports Patrick McKee's affidavit that he "was careful to separate true paralegal work from administrative work that Dan did in this case and did not bill Fulton County for administrative work." (Plaintiffs' Reply in Support of Plaintiffs' Supplemental Motion for Award of Attorneys' Fees and Expenses of Litigation, Ex. C.) [Doc. 338]. Both sides had paralegal assistance throughout the trials. Accordingly, the Court concludes that the time attributed to Daniel McKee in this case is compensable. "To hold otherwise would be counterproductive because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall cost." *Jean*, 863 F.2d at 778.

Third, Fulton County challenges a 35-hour entry by Patrick McKee on January 30, 1997. Fulton County contends that the correct entry is 3.5 hours. Fulton County is correct. The summary calculation of Patrick McKee's time states that he spent 35 hours on "Other Motions, Hearings, Etc." on January 30, 1997. The actual billing records for that day

show that McKee spent 3.5 hours on "[p]reparation for and attendance at hearing." Accordingly, 31.5 of the 35 hours attributed to Patrick McKee for January 30, 1997, are excluded due to this obvious clerical error.

Fourth, Fulton County challenges two identical entries logged by Patrick McKee on July 25, 1998. Both entries pertain to researching and drafting Plaintiff's Motion for Summary Judgment. One entry is for 8.0 hours. The other is for 6.0 hours. Fulton County has raised this discrepancy but Plaintiff has not explained it. Accordingly, the Court excludes the entry of 6.0 hours.

Fifth, Fulton County challenges time that it believes was spent on the appeal of the case, which is noncompensable at this stage. Specifically, Fulton County challenges the following entries in Plaintiff's billing records: (1) 3.0 of the 6.0 hours that Patrick McKee spent on July 22, 1999, to "[c]omplete fee affidavit; review docket and notice of appeal, and [t]elephone conference with Linda Baggett on transcript; trip to district court to order transcript, check status of notice of appeal and file civil appeal statement"; (2) 0.5 of the 3.0 hours that Patrick McKee spent on September 27, 1999, involving "[c]ontingent telephone conference with Ms. Sewell, review schedule and draft letter on PTO, listen to tape, [t]elephone conference with [Mason Barge] on appeal and review response on motion to disqualify"; (3) 0.5 of the 1.0 hours that Patrick McKee spent on October 25, 1999, regarding "[t]elephone conference with [Mason Barge] on strategy for appeal and trial"; and (4) 3.0 hours that Mason Barge spent on February 24, 2000, in "conference with [Patrick McKee] and Daniel Webster on possible post-trial motions, future of case." The Court finds all of these challenges without merit. The hours expended by

Patrick McKee in items (1)-(3) have never been included in the fee petition. They are listed in the billing records, but not in the calculation that underlies the fee petition. As to item (4), this Court agrees with Plaintiff that it is reasonable for counsel and a client to spend 3.0 hours after a trial discussing post-trial motions, such as the petition for attorneys' fees, and the possibility of future proceedings in the district court. Fulton County has failed to elicit evidence that these 3.0 hours related in any way to appellate process. Accordingly, the time is compensable.

Sixth, Fulton County challenges certain clerical, courier, and duplicative time, along with other "inappropriate charges." Plaintiff concedes that the following entries should be excluded and has removed them in its amended summary: (1) 1.0 hours that Daniel McKee spent on January 17, 2000, to copy and deliver a brief; (2) 2.5 hours that Daniel McKee spent on February 25, 2000, to organize documents for storage; (3) 1.0 hours that Holli Hidden spent on December 30, 1997, in an office conference; (4) 0.3 hours Susan Rickertsen spent on November 22, 1996, sending a copy to someone. Accordingly, these objections are now moot. Fulton County also challenges 1.5 hours that Holli Hidden spent on January 22, 1998, drafting a memo regarding lunch access at the Fulton County Government Building. Plaintiff responds that this time is compensable because it relates to remedying untenable conditions its counsel incurred during document production. The Court agrees with Fulton County that this time should not be compensable. First of all, the Court does not think that the time spent on this memo should be compensated at all. Second, even if that were not the case, a 1.5-hour memo on lunch seems excessive. Accordingly, 1.5 hours is excluded.

xiv. PREPARATION OF ATTORNEYS' FEES REQUESTS

Plaintiff requests fees for 156.0 hours spent on its request for attorneys' fees, including the evidentiary hearing on the fee request. According to Plaintiff, work related to this task is divided as follows: Mason Barge – 113.2 hours; Patrick McKee – 37.5 hours; Susan Rickertsen – 5.3 hours. Fulton County has not challenged any of the time in this category at all, or at least not with such specificity as to alert the Court that a reduction is warranted. *See Hensley*, 461 U.S. at 437, 103 S. Ct. 1933 (stating that objections and proof concerning hours that a party wants excluded must be specific and "reasonably precise"). Accordingly, Plaintiff is entitled to fees for all hours that it seeks for the task of "Preparation of Attorneys' Fees Requests."

b. REASONABLE HOURLY RATE

The second half of the lodestar calculation is the determination of a "reasonable hourly rate" for the attorneys' services. Reasonable hourly rates for the purposes of Section 1988 are to be measured by the "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). Prevailing market rates are those rates that are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Id.* at 895 & n. 11, 104 S. Ct. 1541; *ACLU of Ga. v. Barnes*, 168 F.3d 423, 436 (11th Cir. 1999). The applicant attorney's customary billing rate for fee-paying clients ordinarily is the best evidence of his market rate, although that information is not necessarily conclusive. *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354-55 (11th Cir. 2000) ("What [the attorney] charges clients is powerful, and perhaps the best,

evidence of his market rate; that is most likely to be what he is paid 'as determined by supply and demand.'"); *see also National Assoc. of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir.1982) ("The best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm."). A fee applicant also may provide opinion evidence of reasonable rates, which is commonly done by submitting affidavits of other attorneys in the relevant legal community. *Duckworth v. Whisenant*, 97 F.3d 1393, 1396-97 (11th Cir. 1996). Finally, the Court may utilize its own personal experiences and expertise to assess the lawyering skills exhibited during the pendency of the case, *see id.* ("This Court has also been given ample opportunity to assess the lawyering of this case for the Plaintiff."), but the Court cannot simply substitute its own judgment for uncontradicted evidence without an explanation and record support, *NAACP v. City of Evergreen*, 812 F.2d 1332, 1334, 1336 (11th Cir. 1987).

In determining a reasonable hourly rate, the Eleventh Circuit Court of Appeals has provided a list of factors for its district courts to consider.[2] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds, Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989). Although some courts now apply these factors only in determining whether to grant an enhancement to the lodestar, the Supreme Court has stated that these factors usually are subsumed in the lodestar calculation. *Pennsylvania v. Delaware Valley Citizens'*

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

Council, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986). Accordingly, the Court includes them in its analysis of reasonable hourly rates in this case. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 & n.7 (11th Cir. 1999) ("The [trial] court properly considered the reasonable attorney fee guidelines the former Fifth Circuit outlined in *Johnson* [ ], which we have subsequently adopted for reasonable fee determinations for prevailing parties."); *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988) ("We still believe that at least some of the Johnson factors have utility in establishing the hourly rate."); *NAACP v. Evergreen*, 812 F.2d 1332, 1336-37 (11th Cir. 1987) (suggesting that *Johnson* factors might still be considered in terms of their influence on the lodestar amount); *Carey v. Rudeseal*, 721 F. Supp. 294, 298-99 (N.D. Ga. 1989) ("The Eleventh Circuit has indicated that some of the factors set out in *Johnson* [ ] may still have utility in establishing the hourly rate at which a prevailing attorney should be compensated. This is particularly true where there is an issue as to the appropriate rate."). The twelve *Johnson* factors are as follows:

1) the time and labor required;
2) the novelty and difficulty of the questions;
3) the skill requisite to perform the legal service properly;
4) the preclusion of other employment by the attorney due to acceptance of the case;
5) the customary fee;
6) whether the fee is fixed or contingent;
7) time limitations imposed by the client or the circumstances;
8) the amount involved and the results obtained;
9) the experience, reputation and ability of the attorneys;

10) the "undesirability" of the case;
11) the nature and length of the professional relationship with the client;
12) awards in similar cases.

Johnson, 488 F.2d at 717-19; *accord Farley*, 197 F.3d at 1340 n.7; *Gaines v. Dougherty County Bd. of Ed.*, 775 F.2d 1565, 1571 n. 13 (11th Cir. 1985); *Jones v. Central Soya Co.*, 748 F.2d 586, 588 n. 1 (11th Cir. 1984); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1187 n.8 (11th Cir. 1983). These factors are taken verbatim from a previous version of the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106, which guides attorneys in deciding upon a reasonable fee for legal services. A court in its order ideally should state how any of these factors has influenced its determination of a reasonable hourly rate. *See Johnson v. University College*, 706 F.2d 1205, 1210 (11th Cir. 1983) ("As it should have, the court considered all of the *Johnson* factors, indicating how, if at all, each influenced the fee award.").

Accordingly, this Court determines the reasonableness of the hourly rate in this case based on the customary rates that Plaintiff's counsel and other attorneys of comparable skill, experience and reputation in the Northern District of Georgia typically charge in civil rights cases. In addition, this Court takes into account the *Johnson* factors to the extent they affect the reasonableness of the rate. Plaintiff contends that the range of reasonable hourly rates for attorneys of the same skill, experience and reputation as Mason Barge and Patrick McKee is $225.00 to $275.00 per hour and that Messrs. Barge and McKee should be compensated at $275.00 per hour. Defendant responds that $225.00 is the rate at which Messrs. Barge and McKee should be compensated. In

support of the $275.00 hourly rate, Plaintiff has provided the Court with the following evidence:

1. An affidavit and supplemental affidavit by Mason Barge. The original affidavit stated that Mr. Barge graduated from Emory University Law School in 1977 and has practiced law in Atlanta, Georgia since that time, with a practice that has concentrated entirely in the fields of constitutional law, race discrimination and labor law. (Plaintiff's Brief in Supp. of Specification and Itemization of Atty.'s Fees and Non-Taxable Costs, Ex. E.) [Doc. 191]. Mr. Barge stated that most of his work is done on contingency rather than an hourly rate, but that he charges $225.00 per hour for all work that he does perform on an hourly rate basis. He also stated that he believes that he is entitled to a rate of $275.00 per hour in this case based on his application of the *Johnson* factors to the facts of his representation. The supplemental affidavit informs the Court that on April 1, 2000, Mr. Barge raised his hourly rate for fee-based clients to the range of $250.00 to $275.00 per hour and that it is his intention not to accept any more non-contingent work at a rate less than $250.00 per hour, except in special cases of charity work, pro bono work, or work for close friends and family. (Plaintiff's Reply in Supp. of Plaintiff's Supplemental Mot. for Award of Attys.' Fees and Expenses of Litigation, Ex. D.) [Doc. 338].

2. An affidavit by Patrick McKee stating that he is a 1977 graduate of Emory University Law School and has practiced in Georgia since that time. (Plaintiff's Brief in Support of Specification and Itemization of Attorney's Fees and Non-Taxable Costs, Ex. F.) [Doc. 191]. Mr. McKee's principal expertise is in the area of education law. Mr. McKee served for ten years as an assistant and senior

assistant attorney general in the State of Georgia's Law Department representing the State's Board of Regents and Board of Education. Mr. McKee stated that he typically charges between $150.00 and $250.00 per hour to those clients he does not serve as general counsel or represent on contingency. He further stated that he is no longer accepting any new hourly litigation clients for less than $250.00 per hour.

3. An affidavit by Mr. Griffin Bell, Jr., a senior partner in the Atlanta labor and employment firm of Fisher & Phillips, stating that he has practiced law in Georgia since 1970, has known Messrs. Barge and McKee for more than ten years, and is of the opinion that $275.00 is a reasonable hourly rate for the work done in this case. (Plaintiff's Brief in Support of Specification and Itemization of Attorney's Fees and Non-Taxable Costs, Ex. B.) [Doc. 191].

4. An affidavit by Mr. W. Henry Parkman, a partner in the Atlanta construction law firm of Griffin, Cochrane & Marshall. (Plaintiff's Brief in Support of Specification and Itemization of Attorney's Fees and Non-Taxable Costs, Ex. C.) [Doc. 191]. Mr. Parkman has practiced law in Georgia since 1983 and represented the plaintiffs in two affirmative action contracting cases, *Engineering Contractors Association v. Metropolitan Dade County*, 122 F.3d 895, 900 (11th Cir. 1997), and *S.J. Groves & Sons Company v. Fulton County*, 920 F.2d 752, 754 (11th Cir. 1991). He stated in the affidavit that he is familiar both with the challenges of bringing a lawsuit to enjoin an MFBE program and the rates charged by attorneys in the metropolitan Atlanta area. In his opinion, $275.00 is a reasonable rate for Messrs. Barge and McKee in this case.

5. An affidavit by Mr. Roger K. Quillen, a partner with Mr. Bell in Fisher & Phillips, stating that he has practiced law in Georgia since 1980, spends the bulk of his practice defending companies and governments in constitutional and employment cases, has known Mr. Barge for more than ten years, knows the prices charged by attorneys in the Atlanta area for cases similar to the one brought here, and believes that $275.00 per hour is a reasonable rate for Messrs. Barge and McKee's services. (Plaintiff's Brief in Support of Specification and Itemization of Attorney's Fees and Non-Taxable Costs, Ex. D.) [Doc. 191].

6. Testimony at the evidentiary hearing by Mr. William B. Hill, Jr., a litigation partner in the Atlanta office of the law firm Paul, Hastings, Janofsky & Walker. Mr. Hill stated that he graduated from Washington & Lee University Law School in 1977 and immediately thereafter became employed with the State of Georgia's Law Department. He eventually rose to the position of Deputy Attorney General, a position he held until he was appointed a Fulton County State Court Judge in October, 1990. He was appointed a Fulton County Superior Court Judge in April, 1992, and remained in that position until May, 1995, when he resigned from the bench to join Paul, Hastings. Mr. Hill stated that he worked with Mr. McKee for ten years, knows the prices charged by attorneys in the Atlanta area for cases similar to the one brought here, and believes that $275.00 per hour is a reasonable rate for Messrs. Barge and McKee's services. Mr. Hill stated that he personally bills clients at $355.00-$380.00 per hour.

7. The attorneys' fee award in a recent case, *Rau v. Apple-Rio Management Co.*, No. 1:97-CV-2345-GGB (N.D. Ga. Mar. 29, 2000), where Magistrate Judge Brill compensated

William B. Hill, Jr., at a rate of $275.00 per hour. The rate that Mr. Hill requested in that case was $350.00 per hour. (Plaintiff's Reply in Support of Plaintiff's Supplemental Motion for Award of Attorneys' Fees and Expenses of Litigation, Ex. A.) [Doc. 338].

Fulton County has responded to Plaintiff's affidavits with affidavits that support its contention that the appropriate rate for Messrs. Barge and McKee is $225.00 per hour. None of the affidavits that Fulton County provides were prepared for this case. Instead, these affidavits were part of the record in *Rau* and in *Nida v. BellSouth Telecomm., Inc.*, No. 1:97-CV-350-JEC. The affiants in those cases stated as follows:

1. E. Scott Smith, a partner in the Atlanta office of Ford & Harrison who has practiced in Georgia since 1980 and has handled "hundreds" of discrimination cases, typically charges $220.00 per hour. He stated that this rate is comparable to rates charged by other attorneys in the Atlanta market who practice employment law and who are of similar experience, education and expertise. (July 3, 2000, Evidentiary Hearing, Def.'s Ex. 5.)

2. Michael C. Towers, a partner at Fisher & Phillips, stated that he has practiced in Georgia since 1970 and that his billing rates in 1998 and 1999 for all clients ranged from $210.00 to $240.00 per hour. He also stated that the senior litigation partners at his firm with 20 or more years experience typically charge $200.00 to $240.00 per hour for their legal services. (July 3, 2000, Evidentiary Hearing, Def.'s Ex. 6.)

3. Steven C. Ellington, a partner in the Atlanta construction and employment law firm Smith, Currie & Hancock, stated

that he has been a member of the California Bar since 1986 and the Georgia Bar since 1991. He practices solely in the area of labor and employment law and typically charges clients $205.00 per hour. He further stated that the partner with the highest hourly rate in his firm charges $240.00 per hour. (July 3, 2000, Evidentiary Hearing, Def.'s Ex. 7.)

4. Paul Oliver, a principal in the Atlanta law firm of Wimberly, Lawson, Steckel, Nelson & Schneider, P.C., stated that he has practiced in Georgia since graduating from Harvard Law School in 1974 and charged his client $180.00 per hour in the Rau case. (July 3, 2000, Evidentiary Hearing, Def.'s Ex. 8.)

Both sides also have argued that application of the *Johnson* factors supports their assessment of the reasonable rate. In his own affidavit, Mr. Barge listed each of the *Johnson* factors and argued how each one supports a reasonable fee of $275.00 per hour for him. Conversely, Fulton County responded to Plaintiff's petition that an application of the *Johnson* factors does not warrant increasing Messrs. Barge and McKee's fee above $225.00 per hour. This Court deals with each factor, and the parties' arguments, accordingly.

1. *Time and Labor Involved.* Plaintiff states that this case involved a significant time commitment for more than 3 years and that document production alone required the full-time services of two associates for 6 months. Plaintiff, however, has failed to explain how this time and labor is not sufficiently reflected and compensated in the number of hours for which it requests fees. The Court has already taken this factor into account in calculating the reasonable hours expended in the case. For example, in compensating Plaintiff for 2,444.0 hours of document production and analysis, the

Court emphasized the case's four-year existence and that its protracted nature was caused in large part by Fulton County's failure to cooperate. Since the time and labor involved is already reflected in the reasonable hours expended, this factor does not support an increase in Plaintiff's hourly rate although it suggests an hourly rate not at the bottom of the range.

2. *Novelty and Difficulty of the Questions.* Plaintiff states that this case presented novel and difficult legal issues of first impression in the State of Georgia. That may be true, but the legal issues presented were not novel ones of first impression in the Eleventh Circuit. Most of the legal issues in this case were resolved by the Eleventh Circuit in *Engineering Contractors Association v. Metropolitan Dade County*, 122 F.3d 895, 906-29 (11th Cir. 1997). Pursuant to *Engineering Contractors*, Fulton County had a very heavy burden to justify its MFBE program. Although Plaintiff's counsel were required to persevere over the course of three years after *Engineering Contractors*, they had a better than even chance of winning if they were persistent. Persistence is reflected in the number of hours expended in this case and, although commendable, does not alone support an enhancement based upon novel or legally complex issues.

3. *Skill Requisite to Perform the Legal Service Properly.* Plaintiff states that only experienced counsel could have succeeded in this case because of the difficult legal issues involved and the voluminous discovery. This Court, however, has already determined that the lodestar effect of voluminous discovery is reflected in the number of hours expended, and the legal issues in this case were not as novel as Plaintiff argues. As a result, application of this factor does not support Plaintiff receiving an increased rate. The Court

does, however, recognize that Plaintiff's counsel are talented and experienced attorneys (as are defense counsel) who pursued this case with vigor and tenacity (as did defense counsel). This suggests an hourly rate not at the bottom of the range.

4. *Preclusion of Other Employment by the Attorney Due to Acceptance of the Case.* Mr. Barge states that his acceptance of this case has prevented him from attracting African-American and other minority clients in large race discrimination cases. He states that he and his new law firm, Parks, Chesin & Miller, have a long history of representing minority clients and that such representation is now in jeopardy because of this case. Furthermore, Mr. Barge states that the time commitment of this case limited his acceptance of new cases. Mr. McKee states that he does not know of any actual or potential clients he has lost because of this case, but he has been precluded from doing work for some of his clients during the course of this lawsuit. The Court understands that the time commitments of this case possibly have affected Plaintiff's counsels' ability to accept new cases. The Court, however, cannot accept Mr. Barge's contention that he should be compensated at a higher rate on grounds that this case has affected his and his firm's ability to attract minority clients. This case has not affected Parks, Chesin & Miller's reputation any more than all the other high-profile discrimination cases representing white plaintiffs it has accepted over the last ten years, including the representation of (1) numerous white plaintiffs in discrimination suits against Fulton County and other metropolitan Atlanta counties, *e.g.*, *Smith v. Lomax*, 45 F.3d 402, 403 (11th Cir. 1995); (2) white plaintiffs who challenged the State of Georgia's 1991 Congressional and legislative reapportionment plans for maximizing black-majority

districts, *Miller v. Johnson*, 515 U.S. 900, 902-03, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); (3) white plaintiffs who are challenging the University of Georgia's admissions criteria as impermissibly race-based, *e.g., Johnson v. Board of Regents*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000); and (4) white plaintiffs who are challenging the City of Atlanta's affirmative action contracting program, *Lee Gen. Contractors v. City of Atlanta*, No. 1:99-CV-2194-WBH (N.D. Ga. filed Oct. 15, 1999). Accordingly, the Court cannot conclude that the preclusion of other employment is sufficient in this case to support an increased hourly rate.

5. *Customary Fee.* Plaintiff states that there is no customary fee for a case of this type, but then notes that other courts in the Eleventh Circuit have awarded hourly rates of $275.00 to $290.00 per hour in complex cases of government race and gender discrimination. *See, e.g., Mallory v. Harkness*, 923 F. Supp. 1546, 1555 (S.D. Fla. 1996) (awarding $275.00 per hour); *Dillard v. City of Elba*, 863 F. Supp. 1550, 1554 (M.D. Ala. 1993) (awarding $290.00 per hour); *Knight v. Alabama*, 824 F. Supp. 1022, 1032 (N.D. Ala. 1993) (awarding $275.00 per hour). As for their own customary fee, Mr. Barge has stated that his customary fee in non-contingent cases was $225.00 per hour until April, 2000, and is now $250.00 to $275.00 per hour, and Mr. McKee has stated that his non-contingent fee is $150.00 to $250.00 per hour. At the evidentiary hearing, Fulton County's outside counsel indicated that they were paid $200.00 an hour for non-trial work and $225.00 an hour during trial. This factor suggests a fee in the range of $225.00 to $275.00 an hour.

6. *Whether the Fee is Fixed or Contingent.* Mr. Barge stated in the affidavit he filed after the bench trial, "Obviously, the fee was contingent, thus making counsel's regular rate for

hourly work inadequate as the lodestar rate." (Plaintiff's Brief in Support of Specification and Itemization Of Attorney's Fees and Non-Taxable Costs, Ex. E.) [Doc. 191]. The Court, notes, however, that Plaintiff recovered only $8,750 at the jury trial. In light of this, the Court questions whether Mr. Barge would still consider his hourly rate in this case as an inadequate benchmark. In any event, the Court does not believe that the contingent fee arrangement in this case warrants a higher reasonable hourly rate. Nor does the Court believe that Plaintiff's limited monetary relief at the bench trial supports a lower reasonable hourly rate. This case was not as much about recovering financial damages as it was about forcing Fulton County to dismantle an unconstitutional program. Accordingly, the contingent fee arrangement of this case does not affect in either direction this Court's analysis of the reasonable hourly rate.

7. *Time Limitations Imposed by the Client or the Circumstances*. Mr. Barge stated in his original affidavit: "This case created a difficult time situation in the period November, 1997, through June, 1998, due to the extraordinary effort required to analyze documentary and expert evidence. Not only did this schedule limit other employment, it precluded family time, and any semblance of professional or personal normalcy for the duration of the case. A similar situation occurred during trial, when I sometimes went home only to eat and sleep, including weekends." The Fifth Circuit in *Johnson* stated, "Priority work that delays the lawyer's other legal work is entitled to some premium. This factor is particularly important when a new counsel is called in to prosecute the appeal or handle other matters at a late stage in the proceedings." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). Plaintiff has provided no evidence that the work it

completed in this case can be termed "priority work," as might arise in an emergency situation, or that Messrs. Barge or McKee were brought in at a late stage in the proceedings, as they were not. Unfortunately, it is the nature of the profession that practicing law is often time-consuming. Its time-consuming nature is already reflected in the number of hours reasonably expended. Accordingly, the time limitations of this case do not support an increased hourly rate. They do suggest using a rate not at the bottom of the range.

8. *Amount Involved and Results Obtained.* Plaintiff contends that the results obtained were "extraordinary." Apart from the small damage award, the result obtained in this case was the dismantling of Fulton County's 1994 MFBE program and any renewal of the 1994 program. From a public policy standpoint, this was an important and significant result. Nevertheless, the Court cannot find that the results obtained were so extraordinary as to support an increase in counsels' reasonable hourly rate above the rate they typically charge. This factor does suggest setting a rate not at the bottom of the range.

9. *Experience, Reputation and Ability of the Attorneys.* As discussed above, Plaintiff has provided the Court with numerous affidavits of attorneys in the metropolitan Atlanta area who state that a $275.00 hourly rate is reasonable for attorneys of comparable skill, experience and reputation as Messrs. Barge and McKee. Fulton County, in contrast, has provided the Court with affidavits of attorneys who state that a lower rate of $180.00 to $240.00 per hour is reasonable. In light of these affidavits, the Court concludes that while $275.00 per hour is not necessarily an unreasonable rate, there is also evidence that would support an award of $225.00

per hour, as Fulton County contends is proper here. Again, this factor suggests a range of $225.00 to $275.00 an hour.

10. *"Undesirability" of the Case.* Mr. Barge has stated that this case has generated hostility towards him and that, therefore, his hourly rate should reflect the undesirability of this case. The Court cannot agree. Mr. Barge cannot claim that reverse discrimination cases are undesirable to him when his firm indeed specializes in them and has attracted new clients based on his success in this case. *See Johnson v. University College*, 706 F.2d 1205, 1210 (11th Cir. 1983) (stating that district court did not err in concluding that significant civil rights litigation is not undesirable to attorneys whose practice heavily consists of plaintiffs' civil rights work and where success could very well generate other representations in similar cases).

11. *Nature and Length of the Professional Relationship with the Client.* It is true that Plaintiff in this case is not likely to be an ongoing client of Messrs. Barge or McKee. Plaintiff hired Messrs. Barge and McKee not as its general counsel for ongoing matters but rather to assist it in remedying a discrete form of discrimination it was suffering at the hands of Fulton County. Nevertheless, this fact alone does not warrant an increased rate for Messrs. Barge or McKee. This one-time representation presumably will be reflected in any hourly fee award between $225.00 and $275.00 that Messrs. Barge and McKee receive. Mr. McKee admitted in his affidavit that he charges $150.00 to $250.00 per hour for "those clients that I do not serve as general counsel (for whom I give discounted rates)." (Plaintiff's Brief in Supp. of Specification and Itemization of Attorney's Fees and Non-Taxable Costs, Ex. F.) [Doc. 191].

12. *Awards in Similar Case.* The circumstances surrounding this factor have been well-discussed in the above factors. There is evidence in similar cases that would support an award between $180.00 and $290.00 per hour. Thus, those cases do no more than support any award that is within the range of both parties' reasonable rate – $225.00 to $275.00 per hour for Messrs. Barge and McKee's services.

In light of the evidence presented in this case, the Court concludes that the range for a reasonable hourly rate for Messrs. Barge and McKee's services in this case is $225.00 to $275.00. The Court exercises its discretion to compensate Plaintiff for Messrs. Barge and McKee's services exactly in the middle of this range at $250.00 per hour. This conclusion is based on Messrs. Barge and McKee customary rates, the affidavits presented in this case as to the reasonable hourly rate in the metropolitan Atlanta area for attorneys of comparable skill, reputation and experience as Messrs. Barge and McKee, and the Court's application of the *Johnson* factors. Accordingly, the number of hours expended by Messrs. Barge and McKee in this case is multiplied by $250.00 per hour to determine the compensation for their services in this case.

The Court turns now to the reasonable hourly rate of the associate attorneys in this case. Plaintiff contends that the reasonable hourly rate for Ms. Susan Rickersen's legal services in this case is $150.00 and that the reasonable hourly rate is $125.00 for work completed by Ms. Deborah Barrow and Holli Hidden. Fulton County originally did not challenge the associate rates but finally did so at the evidentiary hearing once it heard Plaintiff provide an explanation of the qualifications of its associates and how it compensates them. Fulton County now argues that a lower rate of $100.00 for

Ms. Rickertsen and $75.00 for Ms. Barrow and Ms. Hidden is more appropriate. The Court agrees with Plaintiff that it is irrelevant how Messrs. Barge and McKee actually compensated their associates. The proper test for an award of attorneys' fees is not cost to Messrs. Barge and McKee for associate compensation, but rather the associates' prevailing market rates. *See Blum v. Stenson*, 465 U.S. 886, 892, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) (rejecting contention that fee awards should be calculated "according to the cost of providing legal services rather than according to the prevailing market rate").

The Court, however, does not agree with Plaintiff that the associates' time in this case should be compensated at $150.00 and $125.00 per hour respectively. While Plaintiff has filed several affidavits that $125.00 per hour is reasonable for a junior associate attorney and $150.00 per hour is reasonable for a mid-level associate attorney, the Court should not blindly accept the hourly rate of an advocate and ignore its own personal expertise and experience, as the Eleventh Circuit instructed in *Duckworth v. Whisenant*, 97 F.3d 1393, 1396-97 (11th Cir. 1996). Furthermore, in Rau, for example, Judge Brill recently compensated an attorney who would be a fourth-year associate, if she were still at the firm, $125.00 per hour, as opposed to the requested $170.00 per hour. *Rau v. Apple-Rio Management Co.*, No. 1:97-CV-2345-GGB, at 4, 10 (N.D. Ga. Mar. 29, 2000). It is this Court's conclusion, based on both the evidence presented in this case of prevailing market rates and the Court's analysis of the *Johnson* factors – which apply to associate rates as much as Messrs. Barge and McKee's rates – that a reasonable range for Ms. Rickertsen in this case is $100.00 to $150.00 per hour, and a reasonable range for Ms. Barrow and Ms. Hidden is $75.00 to $125.00 per hour. Again, the Court

will base the fee award on a rate set in the middle of the range, at a $125.00 hourly rate for Ms. Rickertsen and a $100.00 hourly rate for Ms. Barrow and Ms. Hidden.

As discussed above in the reasonable hours calculation, Fulton County challenged all hours attributed to Mr. Daniel McKee on grounds that he is not a trained paralegal, but rather an office manager whose activities are already reflected in the attorneys' hourly rates. The Court disagreed and held that all time in the case that involved paralegal work by Daniel McKee should be compensated. Fulton County has not challenged the $50.00 hourly rate Plaintiff requests for Daniel McKee's paralegal duties. Accordingly, the time expended by Daniel McKee in this case on paralegal duties is compensated at $50.00 per hour.

2. ADJUSTMENT TO THE "LODESTAR"

Once the lodestar is obtained, the Court may then adjust it upwards or downwards. *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); *ACLU of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999); *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988). The Supreme Court and Eleventh Circuit have stated that while the adjustment may be based on a number of factors, the most important factor is the results obtained. *Hensley*, 461 U.S. at 434, 103 S. Ct. 1933; *Norman*, 836 F.2d at 1302. The Supreme Court has warned, however, that upward adjustments are rarely warranted because the factors on which a prevailing party typically seeks an enhancement already have been considered by the Court in determining the reasonable hourly rate:

> Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors "are subsumed within the initial calculation" of the lodestar, we specifically held in *Blum* that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 566, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986). Thus, for the Court to provide an enhancement based on the Johnson factors would result in "double-dipping."

Plaintiff contends that it is entitled to an enhancement because the case has taken four years, Plaintiff prevailed against "a much larger and better-funded opponent," and the results obtained were exceptional results that benefit public policy. As to the first argument, the time expended in this case during the last four years is already reflected in the lodestar calculation and, therefore, cannot support an enhancement. As to the second argument for an enhancement, there is nothing in the precedent of the Supreme Court or the Eleventh Circuit that allows enhancements *per se* where a litigant has succeeded against a larger and better-funded opponent. Plaintiff's third argument why it should receive an upward adjustment to the lodestar, however, requires somewhat more detailed discussion by the Court. As the Eleventh Circuit noted in *Popham v. City of Kennesaw*, 820 F.2d 1570, 1580 (11th Cir. 1987), the public benefit of a plaintiff's civil rights recovery generally does not assume a principal significance in the court's determination of the results obtained, but it may do so if the recovery

"engenders specific spillover benefits for non-parties." *Id.* Here, Plaintiff did not seek relief for a relatively isolated constitutional violation that Fulton County committed only against it. Instead, Plaintiff sought to dismantle an unconstitutional affirmative action plan that steered lucrative county contracts to minorities and women and to the disadvantage of others who sought to conduct business with Fulton County. Although it is true that the Court refused to certify this case as a class action, that fact in no way negates the importance of the case from a public policy standpoint.

Nevertheless, the Court must deny Plaintiff's request for an upward adjustment. Both the Supreme Court and the Eleventh Circuit have held that "the fact that the results obtained would be of far-reaching significance to a large number of people usually is not grounds for enhancement, because the results obtained, as one of the *Johnson* factors, normally will be subsumed in the calculation of a reasonable fee and, therefore, usually should not provide an independent basis for increasing the fee award." *Blum v. Stenson*, 465 U.S. 886, 900, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); *accord NAACP v. City of Evergreen*, 812 F.2d 1332, 1337 (11th Cir. 1987). "Exceptional results are results that are out of the ordinary, unusual, or rare. Ordinarily, results are not exceptional merely because of the nature of the right vindicated or the amount recovered." *Norman v. Housing Auth. of the City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988). In this case, there exist two reasons not to enhance Plaintiff's attorneys' fee award on grounds that it obtained exceptional results. First, as Judge Murphy has explained, "an outcome which is expected in the context of extant substantive law will not ordinarily qualify as outstanding." *Carey v. Rudeseal*, 721 F. Supp. 294, 300 (N.D. Ga. 1989). Fulton County's MFBE Program was

clearly illegal in light of the Eleventh Circuit's decision in *Engineering Contractors Association v. Metropolitan Dade County*, 122 F.3d 895, 906-29 (11th Cir. 1997). No new substantive law was created in this case. The Court ruled for Plaintiff at the injunctive and declaratory relief stage based on the already existing law of *Engineering Contractors*. The Court's decision did not break new ground. It simply stands on the solid ground of Supreme Court and Eleventh Circuit precedent. Second, Plaintiff's persistence is already reflected in the lodestar calculation by the number of hours expended in this case. In short, there are no specific grounds to support an upward adjustment to the already large award suggested by the lodestar. *See Norman v. Housing Auth. of the City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("Even if the results obtained are exceptional, no enhancement is permissible unless there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed."). There is no indication that the success of Plaintiff's attorneys was achieved with any special economies of time or despite unusually difficult circumstances that are not already reflected in the lodestar calculation. Accordingly, the Court must deny Plaintiff's request to enhance the lodestar amount.

Fulton County contends that it is entitled to a downward adjustment in Plaintiff's fee award on grounds that Plaintiff received only a fraction of the monetary relief that it requested. The Court disagrees. First, while it is true that Plaintiff did not receive punitive damages, Plaintiff obtained more than nominal compensatory damages. Second, Plaintiff's counsel should not be penalized for representing a small-business that suffered only a few thousand dollars in damages rather than a large corporation that was

impermissibly precluded from winning a multi-million dollar county contract. Bidders on large contracts are unlikely to challenge the political establishment by pursuing a case such as this. Third, even if the damages award somehow could be considered "nominal," not all nominal damage awards produce purely pyrrhic victories. *Farrar v. Hobby*, 506 U.S. 103, 120-21, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (O'Connor, J., concurring). Plaintiff here was "vindicat [ing] important civil and constitutional right that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986); *see also Norman v. Housing Auth. of the City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("The vindication of a constitutional right is important even if only a small amount of money is involved."). Plaintiff's lawsuit led to the dismantling of an unconstitutional affirmative action contracting program in the largest county in Georgia. Accordingly, Fulton County's request for a reduction in the lodestar must be denied.

C. TAXABLE COSTS

Plaintiff has filed with the Court Bills of Costs [Docs. 185 & 309] in accordance with 28 U.S.C. §§ 1821 and 1920, Fed.R.Civ.P. 54(c), and Local Rule 54.1. The Supreme Court has stated that the word "costs" is a term of art defined by 28 U.S.C. § 1920. *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 87 n.3, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991). Section 1920 provides that only the following items may be taxed as "costs":

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. Although the Court possesses broad discretion whether to award costs, it cannot award as costs any items not set out in Section 1920. *Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir. 1996); *Mallory v. Harkness*, 923 F. Supp. 1546, 1557 (S.D. Fla. 1996); *Jane L. v. Bangerter*, 828 F. Supp. 1544, 1557 (D. Utah 1993).

In this case, on July 9, 1999, Plaintiff filed its first Bill of Costs [Doc. 185] totaling $12,369.86. The Clerk of Court taxed those costs against Fulton County on July 13, 1999. Following the jury trial on damages, on March 2, 2000, Plaintiff filed a second Bill of Costs [Doc. 309] totaling $4,399.83. The next day, the Clerk taxed those costs to Fulton County. The Plaintiff has agreed to remove $772.05 from the Bills of Costs and instead include that amount with Plaintiff's request for non-taxable expenses. Otherwise, Fulton County has not challenged Plaintiff's Bills of Costs. Accordingly, the costs taxed by the Clerk in this case are upheld, as modified, in the amount of $15,997.64.

D. NON-TAXABLE EXPENSES

Plaintiff also requests that it be reimbursed for $62,826.60 in non-taxable expenses that it incurred in this case. According to Plaintiff, it incurred the following non-taxable expenses: (1) $52,330.19 up to and including the bench trial, (2) $5,325.64 after the bench trial and up through the jury trial, (3) $4,398.72 since Plaintiff filed its Supplemental Petition for Attorneys' Fees [Doc. 312], and (4) $772.05 that the parties have agreed to remove from the taxable Bill of Costs [Doc. 309] submitted March 2, 2000, and include instead with Plaintiff's request for non-taxable expenses.

"With the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under § 1988." *ACLU of Ga. v. Barnes*, 168 F.3d 423, 438 (11th Cir. 1999) (*quoting Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983)); *see Mallory*, 923 F. Supp. at 1557 ("[B]ecause the Plaintiff has sought attorney's fees under 42 U.S.C. § 1988, the traditional limits of 28 U.S.C. § 1920 do not restrict the recovery of costs."). Pursuant to § 1988, a plaintiff may recover all out-of-pocket expenses that "would normally be charged to a fee paying client" and are not "routinely absorbed in office overhead." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F. Supp. 1017, 1023 (N.D. Ohio 1997); *Jane L. v. Bangerter*, 828 F. Supp. 1544, 1558 (D. Utah 1993); *Cherry v. Rockdale County*, 601 F. Supp. 78, 81 (N.D. Ga. 1984). Importantly, the Eleventh Circuit has directed that "the standard of reasonableness is to be given a liberal interpretation." *Dowdell*, 698 F.2d at 1192; *accord NAACP v. City of Evergreen*, 812 F.2d 1332, 1337

(11th Cir. 1987). In applying this standard, the Eleventh Circuit and district courts in this Circuit uniformly have allowed recovery of such expenses as photocopying, postage, long distance phone calls, necessary travel, and on-line research. *Cullens v. Georgia Dept. of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994) ("The [district] court denied telephone and travel expenses on the ground that 28 U.S.C. § 1920 does not provide for their recovery. The government acknowledges that this was error . . ."), *Dowdell*, 698 F.2d at 1192; *Mallory v. Harkness*, 923 F. Supp. 1546, 1557 (S.D. Fla. 1996); *Cherry*, 601 F. Supp. at 81. The policy underlying this broad recovery of expenses has been stated by the Eleventh Circuit as follows:

> "Reasonable attorneys' fees under the Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys. If these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly."

Dowdell, 698 F.2d at 1190.

Fulton County challenges only one item that Plaintiff has listed as a non-taxable expense: Plaintiff's expert fees. Fulton County contends that expert fees are not recoverable in a Section 1983 case. The Supreme Court in *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987), held that expert

fees cannot be awarded to a prevailing plaintiff absent explicit Congressional authority because the general costs statutes, 28 U.S.C. §§ 1821 and 1920, do not allow party experts' costs to be taxed to the losing party. *Crawford Fitting*, 482 U.S. at 445, 107 S. Ct. 2494. Following the precedent of *Crawford Fitting*, the Supreme Court four years later specifically held that expert witness fees cannot be awarded to prevailing parties in a Section 1983 action because Section 1988, which governs attorneys' fees in Section 1983 actions, does not explicitly allow recovery of expert fees in Section 1983 cases. *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 102, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991). The Supreme Court emphasized that, in contrast to Section 1988, at least 34 other statutes in effect at the time of the *Casey* decision, including the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), do explicitly allow recovery of expert fees. *Id.* at 89, 111 S. Ct. 1138. Thus, where Congress desires that expert fees be compensated, it has specifically provided so. *Id.* at 88-92, 111 S. Ct. 1138.

A few months after the *Casey* decision, Congress amended Section 1988 to allow expert fees in certain cases. The amended text of Section 1988(c) states:

> (c) Expert Fees. In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

42 U.S.C. § 1988(c). Section 1988(c), therefore, by its terms allows expert fees for prevailing parties in Section 1981 or 1981a cases. It, however, does not specify recovery of expert fees in Section 1983 cases.

Since the Supreme Court's 1991 decision in *Casey* and the amendment to Section 1988 explicitly allowing expert fees in only Section 1981 and 1981a cases, federal courts consistently have held that prevailing parties in Section 1983 cases cannot recover expert witness fees. *Davis v. Mason County*, 927 F.2d 1473, 1487 (9th Cir. 1991); *Petties v. District of Columbia*, 55 F. Supp. 2d 17, 18 (D.D.C. 1999); *Swans v. City of Lansing*, 65 F. Supp. 2d 625, 648 (W.D. Mich. 1998); *Brennan v. Springfield Township*, 1998 WL 792180, at *5 & n. 12 (E.D. Pa. 1998); *McLaughlin ex rel. McLaughlin v. Boston Sch. Comm.*, 976 F. Supp. 53, 69 (D. Mass. 1997); *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F. Supp. 1017, 1024-25 & n.10 (N.D. Ohio 1997); *Johnson v. Mortham*, 950 F. Supp. 1117, 1127 (N.D. Fla. 1996); *Baird v. Consolidated City of Indianapolis*, 830 F. Supp. 1183, 1188 (S.D. Ind. 1993); *United States v. City of Buffalo*, 770 F. Supp. 108, 117 (W.D.N.Y. 1991); *Rivera v. Dyett*, 762 F. Supp. 1109, 1118 (S.D.N.Y. 1991); *Hayes v. City of Seattle*, 131 Wash. 2d 706, 934 P.2d 1179, 1185 (1997), *opinion corrected*, 943 P.2d 265, 265. Fulton County contends that the Court should adhere to this precedent and conclude that Plaintiff cannot recover expert witness fees because those fees are not compensable in Section 1983 actions.

Based on the plain language of the statute and the holdings of numerous other courts on this issue, the Court agrees with Fulton County's analysis of the law that the Civil Rights Act of 1991 amended Section 1988 to provide for expert witness fees only in actions or proceedings to enforce a provision of Section 1981 or 1981a. For the other civil rights statutes to which Section 1988 applies, including Section 1983, *Casey's* holding remains intact to prohibit recovery of expert fees. This conclusion unfortunately may hinder the policies

underlying the award of attorneys' fees in Section 1983 cases, which the Eleventh Circuit stated so clearly in *Dowdell v. City of Apopka*, 698 F.2d 1181, 1190 (11th Cir. 1983) as quoted above. It is, however, Congress' role to change this law. *Casey*, 499 U.S. at 99, 111 S. Ct. 1138. This Court's duty is to follow the law as enacted by Congress and interpreted by the Supreme Court and Eleventh Circuit.

The Court, however, does not agree with Fulton County that expert fees are not recoverable in this case. Fulton County views this case as simply a Section 1983 case. The Court, however, believes it should treat the case as a Section 1981 action for the purpose of expert fees. The Court stated in its February 12, 1999, Summary Judgment Order:

> Section 1981 covers claims for intentional racial discrimination in "the making, performance, modification and termination of [employment] contracts" and in "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981. Success on a Section 1981 claim requires proof of intentional discrimination. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S. Ct. 935, 117 L. Ed. 2d 106 (1992). The Defendants contend that the Plaintiffs' Section 1981 claims are foreclosed because Section 1983 claims for damages constitute the exclusive federal remedy for violation of the rights guaranteed in a Section 1981 action. In *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 2722, 105 L. Ed. 2d 598 (1989), the Supreme Court held that Section 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by Section 1981 when the claim is pressed against a state actor." *Id.* at 733, 109 S. Ct. at 2722. Notwithstanding this controlling

authority, the Plaintiffs respond that the 1991 amendments to the Civil Rights Act, specifically the amendment adding subsection (c) to Section 1981, overruled *Jett* to create an express cause of action for violations of Section 1981 by state actors. Subsection (c) to Section 1981 provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law." Pub. L. 102-166, Title I, § 101 (1991), 105 Stat. 1071, as amended, 42 U.S.C. § 1981(c).

The Eleventh Circuit has yet to consider whether Section 1981(c) overruled *Jett*. The district courts have split as to whether *Jett* was overruled. *Cf. Johnson v. City of Fort Lauderdale*, 903 F. Supp. 1520 (S.D. Fla. 1995), *aff'd*, 148 F.3d 1228 (11th Cir. 1998), *with La Compania Ocho, Inc. v. United States Forest Service*, 874 F. Supp. 1242 (D.N.M. 1995). This Court agrees with the well-reasoned Johnson case which concluded that subsection (c) is consistent with *Jett* and does not create an express cause of action under Section 1981. *Johnson*, 903 F. Supp. at 1522-23. Thus, the only means for the Plaintiffs to seek redress for rights protected by Section 1981 is through a Section 1983 action. In all of the Plaintiffs' counts asserting Section 1981 violations, they have sought relief as enforced by Section 1983. Accordingly, while the Defendants are technically correct with their argument, the Court will not dismiss any of the Plaintiffs' constitutional claims.

Webster, 44 F. Supp. 2d at 1381. The Court thus concluded that Section 1983 is the exclusive federal remedy for bringing Section 1981 claims against governments. Since then, the Eleventh Circuit has addressed the issue and concluded also that the 1991 amendments to the Civil Rights Act "did not

change § 1981 and § 1983 contains the sole cause of action against state actors for violations of § 1981." *Butts v. County of Volusia*, 222 F.3d 891, 893 (11th Cir. 2000). Section 1983, therefore, is the sole jurisdictional vehicle for bringing Section 1981 claims against governments. This simply means that a plaintiff asserting Section 1981 violations against a government must bring them pursuant to Section 1983. It does not mean that governments are free from liability for constitutional violations of the type protected by Section 1981. *See id.*, at 893 n.1 ("Appellant could have sued under § 1983 for the alleged violation of § 1981, but he chose not to do so.").

Unfortunately, the conclusion that Section 1983 is the sole cause of action against state actors for Section 1981 violations might lead to anomalous results in the award of expert fees. If this Court treats this case as a Section 1983 action alone for the purpose of awarding expert fees, then no prevailing party could ever recover expert fees from a government for Section 1981 violations. Such a result would be perverse, especially in light of the vital necessity of expert testimony in factually complex race-and gender-based government contracting cases such as this one. *See, e.g., Engineering Contractors Assoc. v. Metropolitan Dade County*, 122 F.3d 895, 912-24 (11th Cir. 1997) (discussing complex statistical evidence and its decisional importance); *Webster*, 51 F. Supp. 2d at 1367-79. Section 1983 may be the jurisdictional vehicle in this case, but the underlying cause of action stems from Section 1981. Because the underlying cause of action stems from Section 1981 and the Eleventh Circuit policy underlying recovery of attorneys' fees is to reimburse "all reasonable expenses incurred in case preparation," *NAACP v. City of Evergreen*, 812 F.2d 1332, 1337 (11th Cir. 1987) (emphasis added), a plaintiff should

not be denied reasonable expert fees in a case brought to remedy constitutional violations of the type protected by Section 1981.

For this Court to rule otherwise would elevate form over substance. Indeed, this seems especially so when one considers the reasoning of the Supreme Court's plurality opinion in *Jett*. It appears that the principal reason the four-member plurality concluded that Section 1981 does not provide a cause of action against state actors is because Section 1983 already provides the statutory support to sue them. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (O'Connor, J., plurality opinion) ("In the context of § 1981 and § 1982 to private actors, we 'had little choice but to hold that aggrieved individuals could enforce this prohibition, *for there existed no other remedy to address such violations of the statute.*' That is manifestly not the case here, and whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." (Emphasis in original.) (Citations omitted.)). Thus, it is only because Section 1983 already provides a federal remedy that the *Jett* plurality said Section 1981 does not do so in cases against state actors. The Court believes that it would be ignoring the underlying substance of Plaintiff's claims if it concluded that expert fees cannot be awarded in this case. The underlying cause of action stems from a Section 1981 violation, and the Eleventh Circuit has adopted a broad, remedial policy in awarding attorneys' fees. *See Williams v. City of Fairburn*, 702 F.2d 973, 976 (11th Cir. 1983) (stating that attorneys' fees statute is to be interpreted broadly since it is remedial in nature and facilitates private enforcement of civil rights);

Dowdell v. City of Apopka, 698 F.2d 1181, 1190 (11th Cir. 1983) (stating policy reasons why all reasonable expenses incurred should be recoverable). Consequently, the Court concludes that Plaintiff may recover the $29,082.50 in expert fees that it incurred for Dr. George Easton's services.

Plaintiff, however, may not recover expert fees for its other expert, Ms. Sharon Kelly. Ms. Kelly did not testify at trial and consequently provided no assistance to the Court in rendering its decision. *See McLaughlin ex rel. McLaughlin v. Boston Sch. Comm.*, 976 F. Supp. 53, 69 (D. Mass. 1997) (disallowing expert fees where expert did not testify); *Mendoza v. City of Rome*, 162 F.R.D. 260, 264 (N.D.N.Y. 1995) (disallowing expert fees where expert did not testify and no evidence showed expert's assistance with trial preparation); *McCullough v. Cady*, 640 F. Supp. 1012, 1026 (E.D. Mich. 1986) (disallowing expert fees where expert did not testify). Even before the *Crawford Fitting* and *Casey* decisions, courts that reimbursed expert fees did not do so unless the experts testimony was reasonable, necessary, and of assistance to the Court in determining the issues of the case. *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), overruled by *International Woodworkers of Am.*, 790 F.2d 1174, 1180 (5th Cir. 1986). The Court cannot say that Ms. Kelly's services meet these criteria. Accordingly, the cost to Plaintiff of Ms. Kelly's services are excluded from their fee award. Plaintiff's non-taxable expenses are compensable in the amount of $59,540.45, the amount Plaintiff has requested minus the $3,286.15 in expenses that it incurred for Ms. Kelly's services.

E. CALCULATION OF ATTORNEYS' FEES AND COSTS AWARDED

The Eleventh Circuit has stated that a court granting an award of attorneys' fees should provide a summary table explaining how it arrived at the calculation of the attorneys' fees and costs awarded. *See Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co.*, 207 F.3d 1247, 1252 (11th Cir. 2000) ("The trial court should articulate and give principled reasons for its decisions and show some calculations."); *ACLU of Ga. v. Barnes*, 168 F.3d 423, 439 (11th Cir. 1999) ("To the extent that the excessive amount was the result of an arithmetical error, it illustrates why district courts should, show their calculations in fee orders."); *cf. Duckworth v. Whisenant*, 97 F.3d 1393, 1400 (providing summary calculation of attorneys' fees and costs awarded). Accordingly, the Court provides the following summary calculation of the fee award in this case:

Complaints and Mandatory Disclosures (57.4 hours)				$13,197.50
Mason Barge	19.7 hours	x	$250/hour	
Patrick McKee	29.8 hours	x	$250/hour	
Deborah Barrow	2.5 hours	x	$100/hour	
Holli Hidden	4.1 hours	x	$100/hour	
Susan Rickertsen	1.3 hours	x	$125/hour	
Class Certification (0 hours)				0.00

Depositions and Witnesses (407.2 hours)				88,520.00
Mason Barge	80.1 hours	x	$250/hour	
Patrick McKee	239.3 hours	x	$250/hour	
Deborah Barrow	57.5 hours	x	$100/hour	
Holli Hidden	28.1 hours	x	$100/hour	
Dan McKee	2.2 hours	x	$50/hour	
Document Production and Analysis (2,444.0 hours)				287,657.50
Mason Barge	205.6 hours	x	$250/hour	
Patrick McKee	88.7 hours	x	$250/hour	
Deborah Barrow	769.4 hours	x	$100/hour	
Holli Hidden	1,240.6 hours	x	$100/hour	
Susan Rickertsen	81.3 hours	x	$125/hour	
Dan McKee	58.4 hours	x	$50/hour	
Written Discovery (235.7 hours)				44,095.00
Mason Barge	32.2 hours	x	$250/hour	
Patrick McKee	100.4 hours	x	$250/hour	
Deborah Barrow	73.9 hours	x	$100/hour	
Holli Hidden	3.8 hours	x	$100/hour	
Susan Rickertsen	25.4 hours	x	$125/hour	
Other Investigation and Background Research (128.8hours)				25,697.50
Mason Barge	46.9 hours	x	$250/hour	
Patrick McKee	38.8 hours	x	$250/hour	
Deborah Barrow	24.8 hours	x	$100/hour	
Holli Hidden	10.8 hours	x	$100/hour	
Susan Rickertsen	4.5 hours	x	$125/hour	
Dan McKee	3.0 hours	x	$50/hour	
Expert Reports (190.0 hours)				47,215.00
Mason Barge	140.6 hours	x	$250/hour	
Patrick McKee	47.5 hours	x	$250/hour	
Deborah Barrow	1.9 hours	x	$100/hour	
Discovery Motions (123.5 hours)				29,945.00

Mason Barge	65.8 hours	x	$250/hour	
Patrick McKee	51.5 hours	x	$250/hour	
Holli Hidden	6.2 hours	x	$100/hour	
Motions for Summary Judgment (328.4 hours)				79,025.00
Mason Barge	167.0 hours	x	$250/hour	
Patrick McKee	167.0 hours	x	$250/hour	
Deborah Barrow	20.5 hours	x	$100/hour	
Other Pre-Trial Motions (326.2 hours)				81,550.00
Mason Barge	132.9 hours	x	$250/hour	
Patrick McKee	193.3 hours	x	$250/hour	
Bench and Jury Trials (1,178.5 hours)				267,765.00
Mason Barge	316.2 hours	x	$250/hour	
Patrick McKee	728.0 hours	x	$250/hour	
Dan McKee	134.3 hours	x	$50/hour	
Miscellaneous Correspondence and Conferences (155.8 hours)				6,590.00
Mason Barge	71.0 hours	x	$250/hour	
Patrick McKee	69.0 hours	x	$250/hour	
Holli Hidden	9.9 hours	x	$100/hour	
Susan Rickertsen	0.4 hours	x	$125/hour	
Reductions for Other Miscellaneous Matters (-39.0 hours)				-9,525.00
Patrick McKee	-37.5 hours	x	$250/hour	
Holli Hidden	-1.5 hours	x	$100/hour	
Preparation and Litigation of Attorneys' Fees Request (156.0 hours)				38,337.50
Mason Barge	113.2 hours	x	$250/hour	
Patrick McKee	37.5 hours	x	$250/hour	
Susan Rickertsen	5.3 hours	x	$125/hour	

Non-Taxable Expenses	59,540.45
TOTAL ATTORNEYS' FEES AWARDED	$1,089,610.45

IV. CONCLUSION

As noted above, this has been a lengthy and protracted case. The Court's docket for this case now contains 348 entries. Each of those entries represents a pleading, a motion, a brief, a conference with the Court, a hearing, an order, or a day of trial. The fee award is necessarily a large one. It reflects Fulton County's determination to defend at whatever cost an MFBE program that was legally indefensible. For the reasons set forth above, Plaintiff's Motion for Attorneys' Fees or, in the Alternative, Plaintiff's Motion for Interim Award of Attorneys' Fees [Docs. 182 & 191] and Plaintiff's Supplemental Motion for Attorneys' Fees [Doc. 312] are GRANTED, as modified by the Court. Pursuant to 42 U.S.C. § 1988, the Plaintiff is awarded attorney's fees in the amount of $1,089,610.45. The Clerk is directed to enter a supplemental judgment in favor of Plaintiff and against the Defendant Fulton County in this amount and for post judgment interest at the legal rate from February 24, 2000 (the original judgment date). *See Georgia Assoc. of Retarded Citizens v. McDaniel*, 855 F.2d 794, 799 (11th Cir. 1988). The Clerk is directed to tax costs in favor of the Plaintiff and against Fulton County in the amount of $15,997.64.

Appendix E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12216-CC

DANIEL WEBSTER and PEGGY WEBSTER,
KELLY GOFF,

Plaintiffs-Cross Appellants,

WEBSTER GREEN THUMB COMPANY,
and others similarly situated,

Plaintiff-Appellees, Cross-Appellants,

versus

FULTON COUNTY, GEORGIA,

Defendant-Appellant, Cross-Appellee,

MIKE KENN; MICHAEL HIGHTOWER;
NANCY A. BOXILL, EMMA I. DARNELL;
GORDON L. JOYNER, TOM LOWE, ET AL.,

Defendants-Cross-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

Before: ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Bank are DENIED.

ENTERED FOR THE COURT:

_____

CHIEF JUDGE

(2)

Supreme Court, U.S.
F I L E D
FEB 21 2001
CLERK

No. 00-1174

IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, *et al.*,

Petitioners,

v.

DANIEL WEBSTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a Court of Appeals has discretion to decline to consider an argument not presented to the district court in the first instance.

II. Whether a district court has jurisdiction permanently to enjoin a county from engaging in race and gender discrimination in awarding county contracts, where it has engaged in a course of unlawful discrimination for a period of 20 years except when enjoined and intends to continue such conduct in the future.

III. Whether the injunction in this case is moot where the district court found as a matter of fact that the County was going to continue the Program until 2004.

IV. Whether the case is moot where the district court awarded damages as well as declaratory and injunctive relief, and the damages award was predicated in part on the order of the district court here at issue.

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STATEMENT OF THE CASE

Fulton County repeatedly misrepresents the facts of record, both the individual facts proven at trial and the conclusions drawn from them by the district court. The County further attempts to reargue the district court's findings of fact, even though the factual findings of the district court are final[1] and not subject to further appeal.

For example, Fulton County states that it adopted an MFBE Program in 1994 "to alleviate the effects of past and present discrimination." Pet. at 4. The district court, however, determined otherwise:

> There is no evidence that the Fulton County Government has significantly or systematically discriminated against African-American or other minority businesses in the decades of the 1980's or 1990's. There is insufficient evidence that it has become a passive participant in a pervasive system of discrimination in the private sector and that racial and ethnic preferences have been adopted as a last resort to eliminate that discrimination. The program itself does nothing to remedy discrimination in private sector contracting. The goals set by the program are not based upon any realistic assessment of the availability of minority business enterprises in the Atlanta metropolitan marketplace. Pet. App. 63a.

Fulton County then attempts to cite facts to show that it had sought to use race- and gender-neutral means to remedy the

1. The findings of fact were affirmed by the Court of Appeals and the Petition does not claim any finding of fact as error.

alleged discrimination. Again, this representation flies directly in the face of a contrary and final determination of fact by the district court. Pet. App. 55a-62a. For example, the district court found that "Fulton County offered no evidence to refute the testimony of former Chairman Skandalakis that no consideration was ever given to substituting a program of race neutral measures as an alternative to numerical set asides based upon race and ethnicity." Pet. App. 58a.

The County's attempt to limit the scope of the district court's inquiry to the "statute," rather than to the County's conduct both within and without the statute, likewise misrepresents the proceedings below. The Complaint not only asserts that the statutory MFBE Program is unconstitutional but also explicitly and repeatedly accuses the County of discriminatory conduct not authorized by the statute. Perhaps the most egregious misrepresentation by Fulton County in this regard is a significant misquotation of the record on the scope trial.

In the Pretrial Order the district court directly ruled against Fulton County and expressly refused to limit the trial to the "statute." The district court stated: "In Paragraph 6 [of the pretrial order], I'm also **omitting the defendant's suggested statement** that the implementation of the Fulton County MFBE Program is not before the court in this bench trial."[2] However, Fulton County, in its Petition to this Court, quotes only a part of the district court's statement which appears to give the ruling the opposite meaning: "Moreover, at the outset of the trial, the court noted that 'the implementation of the Fulton County MFBE Program is not

2. Trial transcript, 5/11/98, at 3 (boldface added).

before the Court.' " Pet. at 7. Once Fulton County's attempt to mislead this Court, by misrepresenting facts and misquoting the record, is uncovered and the reality the case is understood, the complete lack of actual justiciable issues sufficient to support a writ of certiorari is apparent.

When the district court examined evidence of the County's actual practices, the district court found widespread acts of discrimination outside those authorized by the statute:

> The procedures used to achieve the participation goals included disqualifying majority firm bidders for failing to comply with the program (Pl. Exh. 3-25), awarding contracts to higher bidders in order to obtain minority participation (Pl. Exh. 35, 37), splitting bids so that minority firms received part of a contract when a majority firm was the overall low bidder (Pl. Exh. 49-54), solicitation of minority firms after bids were closed (Pl. Exh. 56, 57), rebidding contracts in order to obtain minority participation (Pl. Exh.58), treatment of the participation goals as mandatory requirements (Pl. Exh. 64-66, 70, 71,116), awarding "points" for minority participation in evaluation criteria (Pl. Exh. 73-77), and awarding an entire contract to minority vendor overall low bidders rather than splitting the contract to give part to majority firms low bidding on some items (Pl. Exh. 78-84). Pet. App. 59a.

Nowhere in the statute is there any provision authorizing such direct discrimination against low-bidding majority-owned businesses. (Exhibits (5/99), Plaintiff's Trial Exhibit 1.) Whether one characterizes this as "implementing" the program goals,

or simply as unconstitutional race discrimination by a politically or racially motivated county government, the County has committed widespread acts of race and gender discrimination not explicitly authorized by the statute itself. The permanent injunction entered by the district court is directed to the unconstitutional practice of race and gender discrimination as well as to the unconstitutional program.

Additional evidence supplied the motivational basis of the race and gender discrimination that occurred outside the statutory framework. Four of the seven County Commissioners are African-American, and the testimony showed that the measure was adopted, not to remedy actual race discrimination, but as the result of "racial politics." Pet. App. 58a. Fulton County Commissioners would "publicly berate, embarrass, ridicule, and threaten" personnel "who appeared before the Commission seeking approval on contracts that did not contain minority participation,"[3] even though such contracts were acceptable according to the program.

A nearly identical program of race preferences had been in place in Fulton County for 20 years for African-American preferences and 11 years for female preferences; and yet, at no point has the County ever proven, identified, considered, or even commissioned a study which concluded that the County was an "active or passive" participant in discrimination against minority- or female-owned business.[4]

3. Doc 148 — Pg 6-7.

4. The only anecdotal complaints of discrimination by female business owners and Native American business owners, either in the last public hearing or in a survey conducted by Fulton County, were that the County discriminated against them **in favor of African-Americans**.

Nor does the Petition mention that a federal district court had previously enjoined the Program, whereupon the County commissioned a study and immediately reimplemented a nearly identical Program. The district court found that the study relied upon by the County was completely inadequate to support an inference of race or gender discrimination and was, at points, "directly contrary to Justice O'Connor's analysis in *Croson*." Pet. App. 30a. Moreover, the evidence showed, and the district court held as a matter of undisputed fact, that the County intended to continue the conduct for at least another five-year period (*i.e.*, until 2004). Pet. App. 61a. Petitioner's attempt to characterize its misbehavior as a discrete and limited program extending for a fixed period and scheduled to end in September 2001 simply mischaracterizes the evidence.

In summary, plaintiff not only successfully pleaded and proved that Fulton County's MFBE Program was unconstitutional but also established that its race and gender discrimination was not limited to the actions authorized by the statute, was not limited to the fixed five year time period contained in the statute, and was not limited to measures drawn to remedy discrimination. The district court appropriately drew its injunction to address this behavior.

REASONS FOR DENYING THE WRIT

The Petition does not properly address the actual grounds of the decision below. The Court of Appeals did not even discuss the scope of the injunction, much less decide the issue. Rather, Fulton County did not present the issue to the district court, and the Court of Appeals refused to reverse, on grounds that the issue had not been preserved for appeal. The Petitioner has not shown any proper grounds for a writ of certiorari on the issue actually decided or even included the most critical issue of law in its "Questions Presented."

The actual grounds of decision also renders the Petitioner's attempt to show a split in circuit authority meaningless, since the Eleventh Circuit has not addressed the proper scope of injunctive relief in this case. The Eleventh Circuit, having not decided the matter, can hardly be in conflict with another circuit. Indeed, the only grounds for reversal would be a finding that a court of appeals does not have discretion to decline to hear an argument not presented to a district court in the first instance, which the Petition does not formally present as a question, much less show any split of authority, issue of national importance, or failure to follow precedent.

Even if the Petitioner had properly preserved the issue for appeal, it would have lost. The scope of the injunction was crafted to fit the evidence at trial. A district court has not only the discretion, but also the duty, to enjoin persistent race and gender discrimination. Here, where Fulton County has had a politically-motivated program of race and gender preferences in effect for 20 years, despite a previous injunction and despite a complete lack of evidence of any need for such preferences, the district court properly issued a permanent injunction.

Nor is the injunction overly burdensome. It does not interfere with the legislative process *per se*. Federal Rule of Civil Procedure 60 provides a simple and reasonable procedure to allow the County to implement such preferences if they are needed.

The claim of mootness is so clearly unfounded in fact that it cannot even be argued in good faith. The district court — in a finding of fact which has not been appealed and which was firmly grounded in the evidence — held that the Program would be continued, at least until 2004, unless it were enjoined.

I.

NEITHER THE RECORD NOR EITHER OF THE DECISIONS BELOW RAISE THE QUESTION OF THE SCOPE OF THE INJUNCTION PRESENTED BY THE PETITION.

A. The Court Of Appeals Declined To Address The Scope Of The Injunction Because It Was Not Presented To The District Court.

The Petitioner's first "Question Presented" does not bring into issue the actual grounds of the decisions below. The Court of Appeals did not decide whether the scope of the injunction was permissible. Rather, it held that Fulton County had failed to present the issue to the district court. The Court of Appeals thus declined to hear the issue for the first time on appeal: "We decline to address appellants' challenge to the scope of the injunction. The argument was not presented to the district court; rather, it was raised for the first time on appeal." Pet. App. 1a. The Court of Appeals did not make or intimate any ruling on the scope of the injunction at all.

Fulton County has thus not correctly framed the initial and critical issue for review. Properly stated, this issue is "Whether the Court of Appeals has discretion to decline to consider an argument not presented to the district court in the first instance."

The County has not argued that the Court of Appeals exceeded its discretion or cited any case authority or statute on the issue. Nor is the actual ground of the Court of Appeal's decision "fairly included" in the two substantive questions presented by the Petition (although the issue is raised in the text of Petitioner's argument). *See e.g.*, *American National Bank & Trust Co. v. Haraco, Inc.*, 473 U.S. 606, 608 (1985). *Cf. Evans v. United States*, 504 U.S. 255, 272 (1992) (Justice O'Connor, *concurring in part*). The failure of the Petition properly to raise the initial question actually presented by the case makes the case an improper one for review by this Court.

B. The Court Of Appeals Opinion Is A Correct Decision On Settled Law That It Need Not Consider An Argument Not First Presented To The District Court.

1. It Is Well-settled That Courts Of Appeals Have Discretion Not To Consider Issues First Raised On Appeal, And There Is No Split In The Circuits On This Issue.

There is no need for this Court to address the issue of a court of appeal's discretion to decline to decide issues not presented to the district court. The basis of the decision is a common holding in a well-settled area of appellate procedure.

"The decision whether to consider an argument first made on appeal is left primarily to the courts of appeals, to be exercised on the facts of the individual cases." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1557 (11th Cir. 1990). "A court of appeals generally will not consider a legal issue or theory unless it was presented to the trial court." *Roofing & Sheet Metal Services v. La Quinta Motor Inns*, 689 F.2d 982, 989 (11th Cir. 1985). The Petitioner has shown no split in authority among the circuits,[5] no disobedience to this Court's previous rulings, no issue of overriding national importance. Indeed, this Court has an almost identical rule: "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Moreover, because the Court of Appeals did not rule on the merits of the scope of the injunction, the Petition does not, perforce, present **any** issue where there is a split of authority in the circuits.[6] The decision of the Court of Appeals in this case implicates neither agreement nor disagreement with the holding in *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.2d 411 (6th Cir. 1999).

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5. The rule seems universal among the circuits. *E.g., Amax Land Co. v. Quarterman,* 181 F.3d 1356 (D.C. Cir. 1999); *Manzoli v. C.I.R.,* 904 F.2d 101 (1st Cir. 1990); *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984); *B.B. Rider Corp. v. C.I.R.,* 725 F.2d 945 (3d Cir. 1984); *Grossman v. C.I.R.,* 183 F.3d 275 (4th Cir. 1999).

6. The district court opinion does stand. However, the Court of Appeals did not affirm it on the issue of the scope of the injunction and it is thus not binding precedent in the circuit on that issue.

2. The Scope Of The Injunction Is Not Jurisdictional And Is Subject To Waiver.

To avoid the necessity of showing that the issue was presented to the district court, Petitioner briefly attempts to depict the issue as a question of "jurisdiction" and urges that the issue is thus not subject to waiver. The only authority cited on this point, *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999), makes no such ruling and is distinguishable from this case.

The *City of Columbus* case involved a constitutional challenge to an affirmative action program, but it did not present allegations or evidence of any wrongdoing other than the facial unconstitutionality of the statute. The City entered into a **consent** order declaring the statute invalid and maintaining continued district court oversight. There was no litigation, no trial, no evidence — simply an agreement by the City of Columbus that its program would not pass Constitutional muster. On these facts the Court of Appeals found that after the consent order was entered there was no live case or controversy over which the district court could maintain jurisdiction, as required by Article III of the United States Constitution, because the consent order ended the program.

The present case stands in a much different posture. First, the district court found that Fulton County intended to continue its widespread constitutional violations in the absence of injunctive relief. Second, the district court found that Fulton county engaged in intentional race and gender discrimination both in and outside the Program. Third, there

was no consent agreement to discontinue the discrimination — only "scorched earth" litigation in an effort to continue the unconstitutional activity to this very day.

Fulton County's jurisdictional argument thus proves too much. If the entry of a permanent injunction against a county deprives a district court of jurisdiction on Article III grounds because once discrimination is enjoined there is no longer a case or controversy, then a district court may **never** enter permanent injunctive relief against race and gender discrimination by a municipal government. Of course, district courts should and do have jurisdiction to enter such relief.

There is no question that a federal district court has *subject matter* jurisdiction to hear this case and issue an appropriate equitable remedy. The extent of an injunction does not generally involve a question of subject matter jurisdiction, and there is no issue of personal jurisdiction. The Fourteenth Amendment, together with its implementing legislation (*e.g.* 42 U.S.C. § 1981[7] and 1983) and jurisdictional legislation (*e.g.* 28 U.S.C. § 1331 and 1343), extend federal court jurisdiction to decide and remedy cases of race and gender discrimination by county governments. Nor does a district court lack subject matter jurisdiction to enjoin a county's race discrimination, even where the order might collaterally impact municipal legislation; this Court has approved, in proper circumstances, equitable remedies for racial discrimination far more intrusive into state lawmaking activities than the one here. *E.g.*, *Spallone v. United States*, 493 U.S. 265 (1990); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The issue

7. There is no need here to argue that § 1981 is or is not enabling legislation, since § 1983 is fully sufficient to support the district court's jurisdiction.

of the breadth and duration of an injunction is certainly an important one (and one which the County should have considered and raised in the district court), but it is not a *jurisdictional* issue per se, and is therefore subject to waiver.

3. The County Had Adequate Opportunity To Raise The Matter Before The District Court.

The Petition also argues that the Court of Appeals erred in refusing to consider the matter, because Fulton County had not gotten an opportunity to contest it at the district court level.[8] The argument was made to (and rejected by) the Court of Appeals within the proper scope of its discretion, and does not constitute a matter of such importance that review by this Court is required.

The argument has no merit, anyway. In the first place, any "surprise" was occasioned only by the County's steadfast refusal to address the plain and explicit allegations of non-statutory conduct in the Complaint. The County had ample warning at the start of trial that the case would involve admission of evidence, and possible findings based on that evidence, of matters outside the statute itself. The district court expressly struck from the pretrial order a paragraph proposed by the County limiting the trial to the statute.

And even if the County were surprised, the Federal Rules of Civil Procedure both contemplate the situation alleged by Fulton County and provide a means for addressing such an issue to a district court. Federal Rule of Civil Procedure 52(b) allows a party to move a court to amend findings or make additional findings, as long as such motion is made

8. Again, this is not a question presented for review.

within 10 days of the judgment. Such a motion may be supported by affidavits. Fed. R. Civ. Proc. 52(c). Federal Rule of Civil Procedure 59 allows a party to move for a new trial and states that the "court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new finding and conclusions, and direct the entry of a new judgment." Fulton County availed itself of none of these avenues of relief available while the case was still before the district court, and its plea that it had no "opportunity" to challenge the scope of the injunction will not hold water.

II.

EVEN IF THE QUESTION WERE PROPERLY PRESENTED, THE INJUNCTION PLACES NO MORE BURDEN UPON FULTON COUNTY THAN THE RECORD SUPPORTS.

A. There Is No Conflict With The Sixth Circuit Because The Scope Of The Injunction Reflects The Extent Of The Injury.

Fulton County has for years engaged in wholesale race and gender discrimination, both in operating the 1994 MFBE Program and in the guise of operating the 1994 MFBE Program. Pet. App. 59a. This illegal discrimination stretched far beyond the terms of the race and gender preferences enacted by the Program and affected the manner in which all contracts were awarded. *Id.* The district court further found that Fulton County would continue its illegal discrimination indefinitely unless enjoined by the court. Pet. App. 61a. These findings are completely undisturbed on appeal. The district court thus issued its injunction directed at the illegal actions of Fulton County:

> Defendant Fulton County is hereby permanently enjoined from using racial, ethnic or gender participation goals in accepting or rejecting bids, determining whether bidders are responsive and responsible bidders *and in the awarding of Fulton County contracts*. Pet. App. 63a [emphasis added].

This injunction reflects evidence of a wide range of discrimination by Fulton County, including both acts that flow directly from the Program and acts that were either not connected to the Program, or at best indirectly connected to it.

The former Chairman of the Fulton County Commission offered unrefuted testimony that "he voted in favor of the 1994 MFBE program to advance his own political agenda by accommodating the African-American majority on the Board rather than to remedy the effects of past discrimination." Pet. App. 58a. Commissioners would publically berate, ridicule, and threaten County personnel who presented contracts with businesses owned by white males. (Doc. 163.) At the time of trial, Fulton County had had in effect a similar program for 20 years, substantially requiring that somewhere between 20% (in 1979) and 26% (in 1999) of all county contracts be awarded to African-American businesses. Pet. App. 3a. In the four years preceding trial, County utilization of minority businesses consistently exceeded even the most liberal estimates of availability; based on a count of minority-owned businesses in the Atlanta Standard Metropolitan Statistical Area, Fulton County's utilization of minority business was almost **double** the statistical expectation, exceeding statistical expectations

by seven standard deviations.[9] On this and similar evidence the district court thus determined that the discrimination engaged in by Fulton County extended far beyond that authorized by the Program.

The decision of the Eleventh Circuit affirming the district court thus is not in conflict with the decision of the Sixth Circuit in *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999), and when properly read is in full agreement with it. The *City of Columbus* case presented a situation in which the parties entered into a consent order agreeing that the *program* was unconstitutional. The district court retained jurisdiction though it made no further finding that the city had engaged in other illegal discrimination outside the program. The Sixth Circuit recognized that the Article III jurisdiction of a federal court extends to issuing expansive remedial orders in "those circumstances in which the . . . mere cessation of the particular activity or method of operation will not serve to remedy the [constitutional] violation." 172 F.3d at 417. The district court in the instant case found Fulton County engaged in blatant racial favoritism in awarding contracts and determined that merely ending the program would not serve to end the practice.

A district court might well, under some factual situations such as that in the *City of Columbus* case, decide that deference to a municipal legislature merits minimal declaratory or injunctive relief. Such is not the case here, due to the strong factors showing a need for broader relief: 1) The County's long history of imposing race and gender preferences without adequate legal justification;

9. Doc. 152 (testimony of George Easton, Ph.D).

2) The County's "repeat offender" status; 3) Evidence that the conduct was motivated by racial politics rather than a good-faith attempt to remedy discrimination; 4) Extensive evidence that the County's favoritism to minority and female business was not limited to the provisions of the MFBE Program; and 5) The proven risk that the county will be able to impose illegal race and gender preferences for years, due to the practical difficulties of bringing it to judgment. The district court conformed its injunction to this evidence.

Finally, the injunction in this case appropriately reflects the heightened scrutiny that the County would eventually encounter in attempting to defend any future explicit race or gender preferences. The Eleventh Circuit has construed this Court's decision in *Croson* to mean that:

> At the outset, it must be recognized that making employment decisions on the basis of race, ethnicity, or gender is presumptively illegal. Therefore, the County bears the initial burden of showing that the race, ethnicity, and gender-conscious measures it uses to determine contract awards is not prohibited by the Fourteenth Amendment.

Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1557 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997). This Court has affirmed injunctive relief more intrusive into the legislative arena, even where the underlying conduct was facially race-neutral. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). *See Spallone v. United States*, 493 U.S. 265 (1990). The factual predicate for such relief where the underlying conduct is explicitly based on race and gender preference must be correspondingly smaller.

Where repeated instances of race or gender discrimination have been proven at trial, the Eleventh Circuit generally considers that a permanent injunction should issue "absent clear and convincing proof that there is no probability of further non-compliance with the law." *N.A.A.C.P. v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982). In general, a court must fashion an injunction whose duration and breadth reflect the evidence. *E.g. Western Airlines, Inc. v. Criswell*, 709 F.2d 544 (9th Cir.), *aff'd*, 472 U.S. 400 (1985). A district court must certainly weigh heavily a county's right to enact legislation; however, such a right cannot constitute a *carte blanche* to enact a third[10] sequential set of racially targeted contracting provisions, where it has been shown in trial that no sufficient cause exists to support such a program. Even worse, it cannot be used as a strawman to hide a county's non-statutory discrimination from the eyes of equity.

B. The Injunction Does Not Preclude The County From Efforts To Remedy Discrimination.

A central weakness of the Petition is reflected in its repeated overstatement of the burden placed upon the County by the injunction. For example, Petition asserts that the "injunction precludes a municipal government from **ever taking any action** to eradicate the effects of past discrimination[11]. . . ." Pet. at 18 (emphasis added).

10. The evidence in support of the "Program" at issue in this case was commissioned — and in fact the Program itself was adopted — in response to an earlier federal district court injunction, enjoining a substantially identical Program.

11. Whether a municipal government can ever impose race or gender quotas "to remedy **past** discrimination" is at best doubtful,

(Cont'd)

In the first place, Fulton County has never given consideration to the use of race- or gender-neutral methods to remedy such discrimination (assuming that such discrimination existed, which the district court held not to be the case). Pet. App. 58a. The contention that the injunction precludes Fulton County from "ever taking any action" is 100% wrong in this respect, and reflects the County's continuing blindness to its duty to attempt such race or gender neutral remedies *before* implementing race- or gender-conscious set-asides.[12]

Next, in the extremely unlikely event that the County begins to discriminate against minority or female businesses, it has means at its disposal to implement racial or gender preferences if and when race-neutral and gender-neutral remedies prove ineffective. A party may petition a district court, in an independent action, for relief from a judgment or order. Fed. R. Civ. Proc. 60(b). The appropriate grounds here would appear to be that "it is no longer equitable that the judgment should have prospective application" and, under this ground, there is no time limit on the filing of such a motion. Fed. R. Civ. Proc. 60(b)(5). The possibility is entirely speculative, though, and in light of the record it seems quite remote.

(Cont'd)
anyway. *Croson* seems to hold that such quotas can only be used to remedy current discrimination.

12. Petitioner's argument that Eleventh Circuit's decision somehow conflicts with the Second Circuit's decision in *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 41 F.3d 62 (2d Cir. 1995), because it presumably prevents the adoption of a new plan, is thus illusory. In addition to the fact that the citation relied upon by Petitioner is mere dicta since the case was determined moot, nothing prevents Fulton County from adopting a plan that is race and gender neutral.

Certainly a county government has a right, and even an obligation, to ensure that it has not become an active or passive participant in discrimination against African-American businesses. The evidence in this case, however, indicates that the possibility of such an occurrence is remote. Fulton County uses the argument, not out of genuine concern, but rather to facilitate continued discrimination against non-minority businesses. Fulton County has for decades continuously discriminated against businesses owned by non-minority members, both by statute and by non-statutory conduct. As held below, such discrimination had no justification whatsoever in "remedying" discrimination. As a matter of undisputed fact, "no consideration was ever given to substituting a program of race neutral measures as an alternative to numerical set asides based upon race and ethnicity." Pet. App. 58a. In a word, the "classifications are in fact motivated by . . . simple racial politics." 488 U.S. at 492.

Third, unlike the injunction in *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.2d 411, 417 (6th Cir. 1999) — which was intended to "in advance restrain[ ] the discretion of a municipal body while it is in the exercise of powers that are legislative in their character," — and, unlike the injunction in *A.C.O.R.N. v. Edgar*, 56 F.3d 791 (7th Cir. 1995) — which Petitioners cite as establishing "the principle that federal courts may not interfere with, or restrain in advance, legislative activity by municipal bodies" — the injunction in the instant case does not prohibit legislative action at all.[13] It would allow Fulton County to propose, consider, debate and actually enact a statute prior to seeking relief from a district court, if such were necessary. The injunction will not operate to suppress

13. *Cf. Spallone v. United States*, 493 U.S. 265 (1990).

legislative debate nor will it interject the district court, unlike the district court in *City of Columbus* or the one in *A.C.O.R.N.*, into the legislative process. What it would not allow is for the County to implement, for a third time, a full-scale program of illegal race and gender discrimination, and continue the Program in effect until a plaintiff appears with the resources[14] and willpower to challenge it, and a district court can bring the case to trial[15].

III.

NEITHER THIS CASE NOR THE INJUNCTION IS MOOT.

The 1994 Fulton County MFBE Program contained, within its four corners, a provision for a five-year extension. Such an extension would have continued the program until September 2004. The district court made a general finding of fact that the Program would be continued unless it were enjoined, including a fairly specific implication that the identical program would have been renewed for five years. Pet. App. 61a. The Court of Appeals affirmed the decision, and the County has not petitioned for certiorari on grounds that the district court abused its discretion in finding this fact.

Given a final finding of fact that the Program would not have expired until 2004,[16] at the earliest, it is difficult to

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14. The district court awarded over 5,500 hours of time to Plaintiff's attorneys in this case, reflecting Fulton County's commitment to retaining the unlawful program of race and gender discrimination at all costs. Pet. App. 200a.

15. The case was filed in 1996; the injunction was entered in 1999.

16. The district court did not mention the year 2004, but it did find that the County intended to avail itself of a five-year extension (Cont'd)

understand how the Petitioner expects this Court to hold that the case is moot in 2001. The district court's finding — that the program would have been continued for at least five years unless enjoined — is now final. The claim of mootness thus cannot even be brought in good faith.

And finally, the claim of mootness simply makes no sense. The doctrine exists in order to guard against meaningless trials and appeals. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). A finding that the case became moot in September 1999, necessarily would require that this Court **first** hold that the injunction expired in September 1999. But if this Court held that the injunction had expired, the matter would be concluded.

Certainly such a holding would not render the **case** moot. The district court's decision holding the program unlawful — the decision at issue here — was the basis of not only injunctive relief, but also the factual and legal basis for a later damages award. It constituted evidence in the liability portion of the damages claim. As held by the district court in a subsequent opinion,

> Plaintiff's success on the damages claims depended greatly on the Court's judgment of the constitutional issues involved in this case. Declaratory and injunctive relief were necessary

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(Cont'd)
provision in 1999. Respondent has thus extrapolated the date of September 2004, which necessarily flows from the district court's findings of fact.

> steps for Plaintiff to achieve monetary relief for damages it incurred. To obtain monetary damages, Plaintiff needed to show that Fulton County's MFBE program was unconstitutional.

Pet. App. 123a-124a. Thus, the district court order cannot be vacated as moot; to vacate the district court's order would effectively vacate the adjudication of liability for monetary damages. Plaintiff would lose its unpaid award of damages on grounds of mootness! Such a *reductio ad absurdum* proves the illogic of Petitioner's case.

This Court has never been sympathetic to arguments of mootness by an unrepentant defendant who so clearly desires to engage in unconstitutional conduct if it can free itself, even temporarily, of federal court review. Such a defendant is universally required to carry a heavy burden of proving that there is no likelihood of the conduct recurring if the case is dismissed for mootness.

> It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.

Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000). Fulton County has shown no record evidence whatsoever that it would cease the unlawful discrimination absent an injunction.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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